TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1923

No. [illegible]275

NEW YORK, PHILADELPHIA AND NORFOLK TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN I. DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE.

FILED APRIL 5, 1923.

(29,522)

(29,522)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 972.

NEW YORK, PHILADELPHIA AND NORFOLK TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN I. DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 23, 1923.

1 **SUPREME COURT OF THE UNITED STATES.**

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY

versus

JOHN I. DOLAN, Collector.

Petition for Writ of Error.

[Filed Mar. 16, 1923.]

Now comes the New York, Philadelphia & Norfolk Telegraph Company, plaintiff in error and petitioner herein and for its Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Delaware, states:

That it is and at all of the times hereinafter mentioned was a corporation duly organized under the laws of the State of Delaware and a citizen of the United States. That it is now and at all of the times hereinafter mentioned was a corporation engaged in the business of transmitting intelligence by wire between various points in the Unied States, both within and without the State of Delaware, to various other points within the United States, both within and without the State of Delaware.

That on the tenth day of March nineteen hundred and nineteen there was filed in the Superior Court of the State of Delaware in and for New Castle County an action at law, wherein your petitioner, this plaintiff in error, was made defendant by one John I. Dolan, Collector of taxes for the Southern District of the City of Wilmington, wherein it was alleged that your petitioner, this plaintiff in error, was indebted to the said City for certain taxes

2 in a specified sum assessed under the authority of Section 80, Chapter 207, Volume 17 of the Laws of Delaware as amended by Chapter 205, Volume 27 of the laws of Delaware.

Your petitioner, this plaintiff in error, entered its appearance in said action and filed its General Demur-er thereto and in support of same it contended before said Superior Court that the said Statutes of Delaware, authorizing the assessment of the said taxes, were each of them illegal and invalid because they each deprived your petitioner, this plaintiff in error, of its property without due process of law and also denied to it the equal protection of the laws, all as expressly forbidden by the Constitution of the United States in the First Section of the 14th Amendment thereto and the 5th Amendment thereto.

Thereafter to-wit on the first day of June nineteen hundred and twenty one the said Superior Court overruled said demur-er and decided that the said Delaware Statutes were not repugnant to the Constitution of the United States or invalid, but were constitutional and valid and the judgment of the said Court was duly entered in

favor of the said Dolan, Collector, for the full amount of the said taxes as claimed by him.

Thereupon your petitioner, this plaintiff in error, duly prosecuted its writ of error from the Supreme Court of Delaware, which is the highest court of the State in which a decision in the suit could be had, to the said Superior Court to review the said judgment rendered against it and in support thereof it assigned and argued as error in the said judgment that the said Delaware Statutes were invalid and illegal because repugnant to the 14th Amendment to the United States Constitution and to the 5th
Amendment to the United States Constitution in that they
3 deprived your petitioner, this plaintiff in error, of its property without due process of law and also deprived it of the equal protection of the laws.

Thereupon said Supreme Court of Delaware, which is the highest Court of the State in which a decision in the suit could be had, did on the sixteenth day of January 1922 decide that the said Delaware Statutes were not illegal or repugnant to the Constitution of the United States as above set out, but were legal and valid and the said Court, therefore, affirmed the said judgment of said Superior Court against your petitioner, this plaintiff in error.

Your petitioner, this plaintiff in error, therefore, respectfully shows that in said Writ of Error filed in said Supreme Court of Delaware, which is the highest Court of the State in which a decision in the suit could be had, and in the judgment of said Court duly entered thereon, there was drawn in question the validity of a Statute of a State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity; and that such decision of said Federal question was necessary to the judgment rendered by said Supreme Court of Delaware. And your petitioner, this plaintiff in error, being grievously damaged by said decision and judgment, which was erroneous as shown in the Assignment of Errors filed herewith, is entitled to have the same reviewed by the Supreme Court of the United States.

Wherefore your petitioner prays that a Writ of Error to said Supreme Court of Delaware be allowed; that Citation be granted and signed; that the Bond herewith presented be approved; and that
upon compliance with the terms of the Statutes by Congress
4 in such cases made and provided, such Bond may operate as a stay of proceedings in the said Supreme Court of Delaware; that the errors complained of may be reviewed in the Supreme Court of the United States and the aforesaid judgment of the Supreme Court of Delaware be reversed. The New York, Philadelphia & Norfolk Telegraph Company, by William C. Fitts, Horace Greeley Eastburn, Overton Harris, Attorneys and Counsel for Petitioner.

A writ of error, as prayed for in the foregoing petition, is hereby allowed this 14th day of March 1923. The writ of error to operate as a supersedeas upon the giving of a bond in the sum of Thirty

Five Hundred Dollars to answer all damages and costs as provided by law, and the same being tendered herewith is approved. Dated at Washington this 14th day of March, 1923. Pierce Butler, Justice of Supreme Court of the United States.

[File endorsement omitted.]

Supreme Court of the United States.

[Title omitted.]

Assignment of Errors.

[Filed Mar. 16, 1923.]

Now comes the New York, Philadelphia & Norfolk Telegraph Company, plaintiff in error herein and in connection with its Petition for a Writ of Error, herein respectfully submits that in the record proceedings decision and final judgment of the Supreme Court of Delaware, which is the highest court of the State in which a decision in the suit could be had, there is manifest error in this, to-wit:

(1) That the Court erred in deciding that Section 80, Chapter 207, Volume 17 of the Laws of Delaware as amended by Chapter 205, Volume 27 Laws of Delaware and Section 84, Chapter 207, Volume 17 Laws of Delaware are valid and do not deprive this plaintiff in error of its property without due process of law as forbidden in the 14th Amendment to the Constitution of the United States and the 5th Amendment thereto.

(2) That the Court erred in deciding that Section 80, Chapter 207, Volume 17 of the Laws of Delaware as amended by Chapter 205, Volume 27 Laws of Delaware and Section 84, Chapter 207, Volume 17 Laws of Delaware are valid and do not deprive this plaintiff in error of the equal protection of the laws as forbidden in the 14th Amendment to the Constitution of the United States.

(3) That the Court erred in overruling the demur-er of the plaintiff in error to the action brought against it by the defendant in error, John I. Dolan, Collector of taxes for the Southern District of the City of Wilmington.

(4) That the Court erred in affirming the judgment of the Superior Court of Delaware in and for New Castle County.

(5) That the Court erred in deciding in so far as it did decide that this plaintiff in error is liable to said defendant in error for the taxes assessed and claimed by the City of Wilmington in its aforesaid action. William C. Fitts, Horace Greeley Eastburn, Overton Harris, Attorneys and Counsel for Plaintiff in Error.

Read on application for Writ or Error, this — day of ——. Pierce Butler, Justice of the Supreme Court of the United States.

[File endorsement omitted.]

7 **Bond on Writ of Error.**

[Filed March 16, 1923.]

Know all men by these presents, That we, New York, Philadelphia & Norfolk Telegraph Company, as principal, and The American Surety Company of New York, as sureties, are held and firmly bound unto John I. Dolan, Collector of Taxes, for the Southern District of the City of Wilmington, in the full and just sum of Three Thousand Five Hundred ($3,500.00) dollars, to be paid to the said John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington, certain attorney, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fourteenth day of March, in the year of Our Lord one thousand nine hundred and twenty-three.

Whereas, lately at a Court in the Supreme Court of Delaware in a suit depending in said Court, between said New York, Philadelphia & Norfolk Telegraph Company and said John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington, a judgment was rendered against the said New York, Philadelphia & Norfolk Telegraph Company and the said New York, Philadelphia & Norfolk Telegraph Company having obtained writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said New York, Philadelphia & Norfolk Telegraph Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue. New York, Philadelphia & Norfolk Telegraph Company. (Seal), By (Sgd.) Overton Harris, Atty. (Seal.) The American Surety Co. of New York. By (Sgd.) Albert Nye, Resident Vice-President. (Seal.) Attest: (Sgd.) Paul D. Cherry, Resident Assistant Secretary. [Seal of the American Surety Company of New York.] Sealed and Delivered in the presence of H. L. Haight, J. A. Maynes.

Approved by (Sgd.) Pierce Butler, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

8 **Writ of Error.**

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Delaware, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Delaware before you or some of you, being the highest court of the State in which a decision could be had in the suit between the New York, Philadelphia & Norfolk Telegraph Company and John I. Dolan, Collector of taxes for the Southern District of the City of Wilmington, wherein was drawn in question the validity of a Statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution or Laws of the United States and the decision was in favor of their validity, a manifest error hath appeared to the great damage of the said New York, Philadelphia & Norfolk Telegraph Company as by its complaint appears and we being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this Writ, so that you have the same at Washington within thirty days from the date hereof in the said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being in-
9 spected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 14th day of March in the year of our Lord nineteen hundred and twenty-three. Wm. R. Stansbury, Clerk of the Supreme Court of the United States. [Seal of the Supreme Court of the United States.]

Writ of Error allowed by Pierce Butler, Associate Justice of the Supreme Court of the United States.

10 **Citation and Service.**

THE UNITED STATES OF AMERICA, *ss:*

To the Honorable John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, D. C., within

thirty days from the date hereof, pursuant to a Writ of Error herein duly allowed and filed in the Office of the Clerk of the Supreme Court of the State of Delaware, wherein the New York, Philadelphia & Norfolk Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error in the said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Pierce Butler, Associate Justice of the Supreme Court of the United States, this 14th day of March 1923. Pierce Butler, Associate Justice of the Supreme Court of the United States.

Copy of the within citation accepted this 16th day of Mar. 1923. John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington.

11 Cited John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington, personally and left copy of writ of error and citation with Reuben Satterthwaite, Jr., Esq., his attorney, this sixteenth day of March 1923.
So answers John H. Bullock, Sheriff. Costs $5.75.

12 **Clerk's Certificate.**

STATE OF DELAWARE, *ss:*

I, Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of the Petition for a Writ of Error to the Supreme Court of the United States, filed in the above-stated case; that the above and foregoing is a true and correct copy of the Assignments of Error filed with said Petition for Writ of Error to the Supreme Court of the United States in said case; that the above and foregoing is a true and correct copy of the supersedeas bond on the said Writ of Error filed in said case; as each of the same *were* filed in the Supreme Court of the State of Delaware at Dover, Delaware, on the 16th day of March, A. D. 1923.

In testimony whereof, I have hereunto set my Hand and affixed the Seal of said Supreme Court of the State of Delaware this 29th day of March, A. D. 1923. Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware. [Seal of the Supreme Court, Delaware.]

13 **Return to Writ.**

The Supreme Court of the State of Delaware, ss.

In obedience to the commands of the within Writ of Error from the Supreme Court of the United States, I herewith transmit to the

Supreme Court of the United States a duly certified transcript of the complete Record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the said Supreme Court of the State of Delaware, at Dover, Delaware, this 29th day of March, A. D. 1923. Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware. [Seal of the Supreme Court, Delaware.]

14 In the Supreme Court of the State of Delaware, January Term, A. D. 1922.

[Title omitted.]

Docket Entries.

Satterthwaite, Jr.
Eastburn.

Atty.	2.67	
Atty.	2.67	
Clerk	5.00	Pd.
" Decree	2.00	
Sheriff	6.25	
Jan. 10 Postage	.06	
Jan. 10 Postage	.06	
Jan. 6 "		
	18.77	

Writ of Error to the Superior Court of the State of Delaware in and for New Castle County.

1922, January 7th, Writ of Errors to the Superior Court of the State of Delaware, in and for New Castle County, No. 73 March Term, 1919.

Same day præcipe received and filed.

Same day Writ of Errors and Citation issued and delivered to the Sheriff of Kent County for service.

Sheriff return Cited John I. Dolan, The Collector of Taxes for the Southern District of the City of Wilmington, Plaintiff Below, Defendant in Error, by acceptance of service by Reuben Satterthwaite, Jr., Attorney, and laid the Writ of Error and
15 Assignment of Error- in the hands of Harvey Hoffecker, Prothonotary, this 13th day of January, A. D. 1922.

1922, January 26th, typewritten copy of Record and Assignment of Errors received and filed.

1922, February 24th, Twenty printed copies of record received and filed.

Same day, Three Copies mailed Reuben Satterthwaite, Jr., Attorney for Plaintiff Below, Defendant in Error.

1922, April 25th, Twenty printed copies of Briefs of Defendant Below received and filed.

Copies of Brief delivered Reuben Satterthwaite, Atty. for Plaintiff Below, by Horace G. Eastburn, Atty. for Defendant Below.

1922, September 26th, Twenty printed copies of Brief of Plaintiff Below received and filed.

Copies of Brief delivered Horace G. Eastburn, Atty. for Defendant Below, by Reuben Satterthwaite, Jr., Atty. for Plaintiff Below.

Judgment.

Argued October 26th, 1922.

And now, to-wit, this Sixteenth day of January, A. D. 1923, the above cause having been duly argued by Counsel for the parties respectively, And it appearing to the Court here that there is no error in the record and proceedings in said cause in the Superior Court of the State of Delaware, in and for New Castle County.

It is thereupon adjudged and ordered that the judgment of said Court in said cause be and it is hereby affirmed, and that the Defendant Below, Plaintiff in Error, pay the costs of said cause in this Court, hereby taxed at the sum of Eighteen Dollars
16 and Seventy-seven cents ($18.77).

And Further, that the Clerk of this Court remit to the said Superior Court a duly certified copy of this judgment, with the Opinion of this Court filed in this cause, in order that such further proceedings may be had in said cause in said Court in conformity with this Judgment, as may be necessary. J. O. Wolcott, Chancellor. W. W. Harrington, J. Charles S. Richards, J. Richard S. Rodney, J.

1923, January 16th, Certified copy of this Decree and the Opinion of the Court filed in this cause, mailed to Harvey Hoffecker, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County.

Attest: Daniel M. Ridgely, Clerk.

1923, March 16th, Petition for Writ of Error to Supreme Court of the United States. Allowance by Justice Pierce Butler of the Supreme Court of the United States, filed.

1923, March 16th, Assignment of Error- to Supreme Court of United States, attached to the above Petition, attested by Justice Pierce Butler of the Supreme Court of the United States, filed.

1923, March 16th, Supersedeas Bond, approved by Justice Pierce Butler of the United States Supreme Court, filed.

1923, March 16th, Writ of Error, allowed by Justice Pierce Butler of the United States Supreme Court, and copy thereof, filed.

1923, March 16th, Citation to John I. Dolan, Collector of Taxes,

tested by Justice Pierce Butler of the Supreme Court of the United States, and copy thereof, filed.

Sheriff returns Cited John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington, personally. d left copy of Writ of Error and Citation with Reuben Satrthwaite, Jr., Esq., his Attorney, this Sixteenth day of March, 1923.

Costs—$5.75.

Clerk's Certificate.

TATE OF DELAWARE,
Kent County, ss:

I, Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware, being the highest Court of said State, in which a decision n said suit could be had, do hereby certify that the above and oregoing is a true and correct copy of the Docket Entries in the bove-stated case, as the same remains of record in said Court at Dover, Delaware, this Twenty-ninth day of March, A. D. 1923. Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware. [Seal of the Supreme Court, Delaware.]

[Title omitted.]

STATE OF DELAWARE,
New Castle County, ss:

At a Superior Court of the State of Delaware, begun and held at Wilmington, in and for New Castle County, on Monday the Third day of March, A. D. 1919, among the records and proceedings of the same Court, with others, is the following, to-wit:

[Title omitted.]

March 10, 1919.—Narr with copy filed.

In the Superior Court of the State of Delaware in and for New Castle County.

[Title omitted.]

Declaration.

The defendant, The New York, Philadelphia and Norfolk Telegraph Company, a Corporation of the State of Delaware, was summoned to answer John I. Dolan, the collector of Taxes for the Southern District of the City of Wilmington, in a plea that the said defendant render unto the said plaintiff the sum of $2,771.26, which the said defendant owes and unjustly detains from the said plaintiff;

And thereupon the said plaintiff by Thomas F. Bayard, his attorney, says that the said John I. Dolan is one of the tax collectors of The Mayor and Council of Wilmington, a municipal corporation of the State of Delaware, and is the duly elected and qualified Collector of Taxes for the Southern District of the City of Wilmington, and that the said The New York, Philadelphia and Norfolk Telegraph Company, a Corporation of the State of Delaware, during all the times hereinafter mentioned was and still is a corporation using poles and wires in the streets of the City of Wilmington, New Castle County, in the State of Delaware, in its business as a telegraph company;

22 That in each of the several years, to-wit, 1913, 1914, 1915, 1916, 1917 and 1918, and, in accordance with the terms of Section 80, Chapter 207, Volume 17 of the Laws of Delaware as amended by Section 1, Chapter 205, Volume 27 of the Laws of Delaware, the proper officials of the said The Mayor and Council of Wilmington did assess at the rate of $7,300.00 per mile the three and one half miles of poles and wires owned, operated and used in its business as a telegraph Company in the streets of the said City of Wilmington, Delaware, by the said The New York, Philadelphia and Norfolk Telegraph Company;

That in accordance with the terms of Section 84 of Chapter 207, Volume 17 of the Laws of Delaware, the proper City Officials of the said The Mayor and Council of Wilmington did legally apportion and determine a certain rate upon every hundred dollars as assessed, as aforesaid against the said The New York, Philadelphia and Norfolk Telegraph Company for the years 1913, 1914, 1915, 1916, 1917, and 1918 as follows, to-wit:

For the year 1913 at the rate of $1.53 per hundred dollars.
For the year 1914 at the rate of $1.35 per hundred dollars.
For the year 1915 at the rate of $1.35 per hundred dollars.
For the year 1916 at the rate of $1.35 per hundred dollars.
For the year 1917 at the rate of $1.35 per hundred dollars.
For the year 1918 at the rate of $3.45 per hundred dollars.

That upon the assessments aforesaid and at the rates aforesaid, the tax levied against The New York, Philadelphia and Norfolk Telegraph Company, as aforesaid, was for the said several years as follows:

23 For the year 1913..... $390.91
For the year 1914..... $344.93
For the year 1915..... $344.93
For the year 1916..... $344.93
For the year 1917..... $344.93
For the year 1918..... $868.70

That by reason of the failure and continued failure of the said defendant, The New York, Philadelphia and Norfolk Telegraph Company, to pay the taxes so assessed as aforesaid, the taxes for each year, as aforesaid, beginning with the month of September of each

ear in which the said taxes were assessed, have, in accordance with Section 88, of Chapter 207, Volume 17 of the Laws of Delaware, been increased by the addition of five per centum to be added thereto, to-wit:

For the year 1913	$19.54
For the year 1914	$17.24
For the year 1915	$17.24
For the year 1916	$17.24
For the year 1917	$17.24
For the year 1918	$43.43

That heretofore and until the present time, the said The New York, Philadelphia and Norfolk Telegraph Company, the defendant herein, although notified and requested so to do has refused and continues to refuse to pay all or any of the said tax so assessed, as aforesaid, with the penalties accrued thereon as aforesaid.

Wherefore, the said John I. Dolan, the Collector of Taxes for the Southern District of the City of Wilmington, by reason of the premises aforesaid brings this his suit against the said The New York, Philadelphia and Norfolk Telegraph Company for the sum of $2,771.26 and prays Judgment for the sum of $2,771.26.

Thomas F. Bayard, Attorney for Plaintiff.

August 6, 1919. The defendant demurs with copy.

24 In the Superior Court of the State of Delaware in and for New Castle County.

[Title omitted.]

Demurrer.

And the said defendant, by Horace Greeley Eastburn, its attorney, saveth:

That the said Narr of the said plaintiff and the matters therein contained in manner and form as the same are in said Narr pleaded and set forth are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against it, the said defendant, and that it, the said defendant, is not bound by the law of the land to answer the same, and this it, the said defendant, is ready to verify.

Wherefore, for want of a sufficient Narr in this behalf it, the said defendant prays judgment if the said plaintiff ought to have or maintain its aforesaid action against it &c. Horace Greeley Eastburn, Attorney for Defendant.

I, Horace Greeley Eastburn, attorney for the defendant, *bring* the demurrent in the above stated cause and counsel filing the above demurrer, do hereby certify that the foregoing demurrer, in my opinion, is good in law, and is not filed for the purpose of delay. Horace Greeley Eastburn, Attorney for Defendant.

25 **Order Transferring Cause to Court en Banc.**

And now to wit, this Thirteenth day of January, A. D. 1921, the plaintiff in the above stated case having heretofore filed his Narr. and the defendant having demurred thereto, the same having been read and considered by the Court, it is considered by the Court that the question of law therein contained ought to be decided by the Court in Banc; and it is therefore, on the joint application of the parties, ordered by the Court, and they do hereby direct that the same be heard by the Court in Banc. Henry C. Conrad, J. T. B. Heisel, J.

June 1st, 1921.—Court in Banc.

Order Certifying Opinion to Lower Court.

And now to wit, this first day of June, A. D. 1921, it is the opinion of this Court that the demurrer to the declaration in this cause should be overruled.

It is ordered that this opinion be and the same is hereby certified to the Superior Court for New Castle County. James Pennewill, C. J. Wm. H. Boyce, J. Herbert L. Rice, J. T. B. Heisel, J.

And Now To-Wit, this first day of June, A. D. 1921, whereas the opinion of the Court in Banc has been certified to this Court wherein it appears that the demurrer to the declaration filed in this cause should be overruled, said demurrer is, therefore, hereby overruled. Herbert L. Rice, J. T. B. Heisel, J.

Docket Entries.

June 1st, 1921.—Horace G. Eastburn, Attorney for defendant elects to take final Judgment.

June 1st, 1921.—Demurrer overruled and on election of defendant's Attorney, final Judgment in favor of plaintiff.

26 [Title omitted.]

June 6th, 1921.—Court granted Horace G. Eastburn, Esq., Attorney for defendant until First day of September Term 1921, to file Bill of Exceptions.

Sept. 19th, 1921.—Bill of Exceptions received and filed Jan. 13, 1922. Writ of Error received and filed.

27 In the Supreme Court of the State of Delaware.

[Title omitted.]

Assignments of Error.

And now comes the New York, Philadelphia and Norfolk Telegraph Company, a Corporation of the State of Delaware, the Plaintiff in Error above-named, by Horace Greeley Eastburn, its attorney, and says that in the record, proceedings and judgment in the above-stated cause, there is manifest error in the following, to-wit:

1. That the Court Below erred in refusing to give a verdict for the defendant on its demurrer, on the ground as raised by the defendant below that the Statutes of the State of Delaware, to-wit: Sec. 80, Chap. 207, Volume 17, Laws of Delaware, as amended by Chap. 205, Volume 27, Laws of Delaware, and Sec. 84, Chap. 207, Volume 17, of the Laws of the State of Delaware, are unconstitutional, as being in conflict with the Constitution of the State of Delaware and the Constitution of the United States of America, and particularly
28 in conflict with Sec. 7 of Article 1 of the Constitution of the State of Delaware, which provides that "no person shall be deprived of life, liberty or property unless by the judgment of his peers or by the law of the land"; and particularly in conflict with Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, in that, said Statutes of the State of Delaware when enforced, deprive the defendant of its property—

(*a*) "Without due process of law"; and that it denied to the defendant

(*b*) The equal protection of the law.

2. That the Court Below erred in refusing to sustain the demurrer of the Defendant Below on the ground raised by the Defendant Below, that the Statutes of the State of Delaware recited in the Declaration of the Plaintiff Below, under which the said action was brought are unconstitutional and in conflict with the Fourteenth Amendment of the Constitution of the United States, which said Amendment provides, in Sec. 1 thereof, inter alia, as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the law."

3. The Court Below erred in declining to order that judgment be entered in favor of the defendant Below on its demurrer, as requested and contended for by the defendant, and in having ordered final judgment in favor of the plaintiff, with Six cents costs and costs of suit, contrary to the contention of the defendant that judgment should be entered in favor of the defendant, for the reason that the Statutes of the State of Delaware, upon which the said action at law was brought, are unconstitutional and in conflict with the Con-

stitution of the United States and with the Constitution of the State of Delaware, in that said Statutes of the State of Delaware, to-wit: Chap. 207, Volume 17, Laws of Delaware, as amended by
29 Chap. 205, Volume 27, Laws of Delaware, arbitrarily places a value for tax purposes upon the property of the defendant without giving it any right to be heard as to the fairness of such valuation, thus depriving it of its property without due process of law.

4. The Court Below erred in declining to order that judgment be entered in favor of the defendant below on its demurrer, as requested and contended for by the defendant, and in having ordered final judgment in favor of the plaintiff, with Six cents costs and costs of suit, contrary to the contention of the defendant that judgment should be entered in favor of the defendant, for the reason that the Statutes of the State of Delaware, upon which the said action at law was brought, are unconstitutional and in conflict with the Constitution of the United States and with the Constitution of the State of Delaware, in that said Statutes of the State of Delaware, to-wit: Chap. 207, Volume 17, Laws of Delaware, as amended by Chap. 205, Volume 27, Laws of Delaware, deny to the defendant Below the equal protection of the Laws, in that, the provisions of said Statutes of the State of Delaware discriminate against the property of the defendant by placing an arbitrary valuation thereupon, irrespective of the actual value, thus subjecting the defendant to an unjust proportion of the public taxes.

5. The Court Below erred in declining to order that judgment be entered in favor of the defendant below on its general demurrer, as requested and contended for by the defendant, that the Statutes of the State of Delaware, upon which the said action at law was founded, are unconstitutional and in conflict with the Fourteenth Amendment of the Constitution of the United States, and in having ordered judgment in favor of the plaintiff, with Six cents costs and costs of suit,

30 Wherefore, the Defendant Below, Plaintiff in Error, prays seal of said Court, this twenty-first day of January, A. D. 1922. Harace Greeley Eastburn, Atty, for Defendant Below, Plaintiff in Error.

Clerk's Certificate.

STATE OF DELAWARE,
New Castle County, ss:

I, Harvey Hoffecker, Prothonotary of the Superior Court of the State of Delaware, in and for New Castle County, which Court is a Court of Record, do hereby certify that the above and foregoing is a true and correct copy of the record and proceedings in the case there stated, as the same remains of record in said Court at Wilmington.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this twenty-first day of January, A. D. 1922. Harvey Hoffecker, Prothonotary. [Seal.]

Clerk's Certificate.

STATE OF DELAWARE,
King County, ss:

I, Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware, being the highest Court of said State, in which a decision in said suit could be had, do hereby certify that the above and foregoing is a true and correct copy of the Docket Entries and of the Record and of the Assignments of Error and of all the proceedings had in the Supreme Court of the State of Delaware, in the above-stated case, as the same remains of record in said Court at Dover, Delaware, this Twenty-ninth day of March, A. D. 1923, and further, that attached hereto is a copy of the Opinions filed by the Judges of the said Supreme Court of the State of Delaware in said case. Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware. [Seal of the Supreme Court of Delaware.]

In the Supreme Court of the State of Delaware, January Term, 1922.

[Title omitted.]

Opinion.

Writ of Error to the Superior Court of the State of Delaware in and for New Castle County.

Wolcott, Chancellor, Harrington, Richards and Rodney, JJ., Sitting.

Horace G. Eastburn, for Plaintiff in Error.
Reuben Satterthwaite, Jr., for Defendant in Error.

Supreme Court, January Term, 1923.

Per Curiam:

The defendant in error, a tax collector of the City of Wilmington, brought suit against the plaintiff in error for taxes due to said City for the years 1913 to 1918 inclusive. To the declaration in said case the plaintiff in error filed a demurrer. The demurrer raised questions as to the construction and constitutionality of the act under which the taxes were laid. The question was heard before the Court in Banc and pursuant to its opinion the demurrer was overruled by the Superior Court, final judgment taken thereon and this writ of error sued out.

The statutory provisions covered by the argument are Section 80 of Chap. 207, Vol. 17 Laws of Delaware, known as the Charter of the City of Wilmington and two amendments thereto, one approved March 25, 1907, Sec. 16 of Chap. 177, Vol. 24 Laws of

Delaware (Page 353) and the other approved April 7, 1913, being Chap. 205, Vol. 27 Laws of Delaware (Page 525).

It is contended by the plaintiff in error that the tax imposed is a real estate tax with no opportunity for a hearing on the part of the taxable; that the statutory assessment on its poles and wires of from $6,600 to $7,300 a mile is arbitrary and confiscatory and, therefore, the act is unconstitutional.

The appellee contends, however, that the tax in question is not a real estate tax but a franchise tax or license fee imposed because of the use of the public streets, is not confiscatory and is violative of no constitutional requirement.

RODNEY, *J.*, delivering the opinion of the Court:

The entire question here involved is one of statutory interpretation. The research of counsel has, admittedly disclosed no statute of any other jurisdiction bearing any similarity to the one before this Court, nor has a thorough examination by this Court brought any to light. Citations of other courts can, therefore, be of no assistance, and we must look to the statute itself for its true meaning. While the issue is a narrow one, the question is important and interesting, and its answer may, like most cases of pure statutory interpretation, be justly liable to a charge of prolixity.

A critical examination of the section of the Charter of Wilmington in question, tracing the amendments thereto in their turn, can lead to no other conclusion than that the payment required to be made by telegraph companies is in the way of a license fee and is not a real estate assessment and tax.

The original section is as follows (Sec. 80, Chap. 207, Vol. 17):

"All real estate within the said city shall be assessed, except real estate belonging to the United States, the State of Delaware, Newcastle County, or the City of Wilmington, cemeteries and burying grounds, churches and meeting houses belonging to any religious society and used for public worship, real estate owned and used for charitable purposes by the associations known as the Trustees of
the 'Home for Friendless and Destitute Children in the City
34 of Wilmington', 'Home for Aged Women', 'Sisters of Charity', and buildings owned and occupied by fire companies. The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so pro rata. The real estate shall be described with sufficient particularity to be clearly indentified, the principal improvements thereon if any, to be also specified. Real estate, the owner or owners of which cannot be found or ascertained, may be assessed to 'owner unknown'. Every male citizen above the age of twenty-one years shall be rated for a capitation or poll-tax in addition to the assessments of his real estate, at a capital not exceeding two thousand dollars nor less than one hundred dollars."

It was repeatedly asserted in the brief of the appellant that the statute in question "refers to real estate and nothing else". Passing attention is directed to the words of the original act "Every male citizen above the age of twenty-one years shall be rated for a capitation or poll tax in addition to the assessment of his real estate, at a capital not exceeding two thousand dollars nor less than one hundred dollars".

This is not a provision for a real estate tax but for a capitation or poll tax. The provision for a capitation tax has not been amended and is still part of the section.

On March 25th, 1907, the above section was amended by inserting between the word "companies" in the tenth line of the original section and the word "the" in the eleventh line a long amendment of which the following are the only material parts:

"The Mayor and Council of Wilmington be and it is hereby given express authority to collect and receive annually from telegraph, telephone, water, electric light, gas, street railway and heat and light companies operating within the City of Wilmington the taxes herein specified * * *

"D. From all persons, firms, associations or corporations owning or operating any telegraph or telephone company doing business within the limits of the City of Wilmington, the sum of one hundred dollars per mile for each mile of streets of said city, used by such telephone or telegraph company for its wires and poles overhead, * * *.

"E. From all persons, firms, associations or corporations, owning or operating any electric light, telephone or telegraph company within the limits of Wilmington the sum of sixty dollars per mile for each mile of the streets of said city used by any such company for underground conduits, * * *.

"G. (3) The taxes provided for by this amendment shall be in lieu of and instead of all taxes, licenses and revenue imposed, required or derived from any conduits, pipes mains, ducts, wires, road beds, tracks, ties, poles, cables, lamps, lights and all other equipments, materials and apparatus belonging to any such persons, firms, associations or corporations in or placed in, on or over the streets of the City of Wilmington."

It is asserted in the brief of the appellee that the license fee or franchise tax imposed by the foregoing amendment was paid by the appellant and other companies similarly affected until the year 1913, when the act now under construction was passed.

On April 7, 1913, the Act under construction was approved and became a law. Its effect is very curious. Its drafting is crude and inartistic, but its intent is obvious from every consideration. Notwithstanding the fact that the amendment of 1907 (Vol. 24, Chap. 177, Sec. 16) had inserted ninety-nine additional lines between the word "companies" in the tenth line and the word "the" in the eleventh line of the original act the new law of 1913 paid no attention to this renumbering and added an amendment consisting of one hundred and forty-eight lines making them to be inserted be-

tween the word "companies" in the tenth line and the word "every" in the eighteenth line, oblivious to the fact that while the word "every" did appear in the eighteenth line of the original section, ninety-nine lines had been inserted before it by the act of 1907. Since both the amendment of 1907 and the amendment of 1913 were inserted immediately after the word "companies" in the tenth line, I will assume for preliminary consideration that the amendment of 1913 was in place and stead of that of 1907 and repealed the first amendment.

Upon this assumption, therefore, the statute since 1913 has read, insofar as this appellant company is concerned, as follows:

"Sec. 80. All real estate within the said City shall be assessed, except real estate belonging to the United States, the State of Delaware, New Castle County, or the City of Wilmington, cemeteries and burying grounds, churches and meeting houses belonging to any religious society and used for public worship, real estate owned and used for charitable purposes by the associations known as the 'Trustees of the Home for Friendless and Destitute Children in the City of Wilmington', 'Home for Aged Women', 'Sisters of Charity', and buildings owned and occupied by fire companies, * * *.

"'All street railway lines, all gas mains, all electric light poles and wires, all telephone or telegraph poles and wires, all poles and wires used in transmitting heat, light or power, all pipes, conduits, wires or other underground construction, used as electric light, telephone or telegraph lines, or in transmitting electric light, heat or power, and all pipes or conduits used in carrying water, located on the public streets in the City of Wilmington or on private property not otherwise taxed, excepting those now exempted from taxation by law, shall be assessed in the following manner: * * *

"'(*c*) All electric light, telephone or telegraph poles and wires overhead, used as electric light, telephone or telegraph lines, located in the Streets of the City of Wilmington shall be assessed per mile or fraction thereof, for each mile of the streets used, but such assessment shall not be less than Six Thousand and Six Hun-
36 dred Dollars, and not more than Seven Thousand Three Hundred Dollars per mile'.

"(*e*) All telephone, telegraph or electric light underground conduits, or wires, pipes, conduits or other underground construction used in transmitting heat, light or power, located in the streets of the City of Wilmington, shall be assessed per mile or fraction thereof, for each mile of the streets of the City used, but such assessment shall not be less than Four Thousand Dollars and not more than Four Thousand Four Hundred Dollars per mile.

"Every person, firm, association or corporation owning or operating any street railway, gas mains, electric light, heat and power, telephone or telegraph lines, and water pipes in the City of Wilmington, mentioned in this section, shall on or before the first day of April of each and every year, file with the Clerk of the Council of the said City of Wilmington, a sworn statement which shall set out the following: * * *.

"(2) In the case of every such person, firm, association or corporation owning or operating any telegraph, telephone, gas, water, electric light, or heat and power business, system, or plant, shall state the total number of miles of the streets of the City of Wilmington used by every such person, firm, association or corporation, overhead and underground, in its said business.

"(3) In case of an individual, firm or association transacting any such business, said statement shall be verified by the oath or affirmation of any one of the persons, owning or operating the same; and in the case of every corporation owning or operating any such business, said statement shall be verified by the oath or affirmation of the Treasurer of every such corporation. Said taxes shall be due and payable to The Mayor and Council of Wilmington annually at the same time that the City and School taxes due said City are payable, and shall be subject to the same rebates, deductions, discounts, allowances and penalties as are now or hereafter may be provided by law in reference to such city and school taxes.

"The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so pro rata. All assessments upon real estate shall be so made as to show separately the valuation of the improvements upon and the total valuation of the property assessed, and such property shall be described with such particularity as will enable it to be clearly identified, and the name of the owner, or last owner or reputed owner shall be given, if known. Such name shall be regarded as an aid to identify such property, but a mistake in the name of the owner last known or reputed owner, or the absence of name, shall not affect the validity of the assessment or any tax based thereon.

"Every male citizen above the age of twenty-one years shall be rated for a capitation or poll tax in addition to the assessments of his real estate, at a capital not exceeding (three) thousand dollars nor less than one hundred dollars.

"Section 2. That the Board of Assessment, Revision and Appeals for the City of Wilmington, shall be and they are hereby authorized to make the first assessment on street railway lines, gas mains, electric light poles and wires, poles and wires used in transmitting heat, light or power, pipes conduits and other under ground construction, used as electric light, telephone or telegraph lines or in transmitting electric light, heat or power, and all pipes or conduits used in carrying water, as provided for in this Act, at any time prior to the thirty-first day of May, A. D. 1913, for the next fiscal year previous notice of such intended assessment, designating the time at which the same will be made, being given by the Board in writing to the owner, owners, operator or operators of said property."

"Section 3. That Section 16 of Chapter 177, Volume 24, Laws of Delaware, approved March 25th A. D. 1907, insofar as it is inconsistent herewith, as well as all other acts or parts of acts inconsistent herewith, are hereby repealed."

In the brief of the appellant and at the argument much stress was laid upon the fact that the amendment of 1913 contained the provision that real estate assessment "should be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so pro rata", and, it was argued, since the Act of 1913 was solely for the purpose of taxing appellant and similar companies, the intention was clearly shown to impose a real estate tax.

The suggestion and argument lose all their force and the reason of the inclusion of the above quoted words in the amendment of 1913 become manifest when it is seen that the identical words appeared in the original charter between the word "companies" in the tenth line and the word "every" in the eighteenth line, and that all these words were stricken out in the original act by the 1913 amendment, and their reenactment in that amendment was a desirable step, and they became operative, not necessarily to the words of the amendment, but to the remaining parts of the original act.

Especial attention must be drawn to Section 3 of the Act of 1913. This repealed only such parts of the 1907 Amendment as were inconsistent with it. The 1907 Amendment was concede-ly not a real estate assessment but imposed a license or franchise tax or rather a privilege tax for the use and occupation of the streets. This is admitted to be true, and indeed, from the context of the amendment, cannot well be denied. The authorities are uniform in holding that the imposition of a franchise or license tax does not conflict with the laying of a real estate tax. 26 R. C. L., 266; Ex parte Schuler, 167 Cal. 282; 139 Pac. 685; Ann. Cas. 1915 C., 706; Denver City R. Co. v. Denver (Col.), 41 Pac. 826, 29 L. R. A. 608; Harder v. Chicago, 235 Ill., 58, 14 Ann. Cas. 536; Northwestern &c. Ins. Co. v. Lewis, &c., County (Mont.), 72 Pac. 982; 98 A. S. R. 572; See also notes to 131 A. S. R., 875 and 60 L. R. A. 367.

If, therefore, the tax imposed by the 1913 Amendment is a real estate tax, the license or franchise tax imposed by the 1907 Act remains in full force and both are fully operative. If the tax imposed by the 1913 Amendment is a franchise or license tax, all inconsistent provisions of the 1907 Act are repealed and the 1913 Act remains alone.

38 When we consider that the purposes of the 1907 and 1913 Acts are the same, we are inclined to the opinion that the Act of 1913 was intended as a repealer of the 1907 Act, but we are irresistably forced to this conclusion when we consider the effect of both being in operation at the same time.

Both acts provide that the words of the respective amendments shall be inserted after the word "companies" in the tenth line of the original act. That this is an impossibility is immediately apparent, as it would be impossible even to reduce the original act and amendments to writing in such a way as to secure the insertion of the amendments in the places designated for such insertion.

That the tax collectible under the 1913 amendment is a privilege tax imposed by reason of the occupancy of the public streets by the

laintiff in error and is not an ad valorem tax seems to us quite evi-ent.

It is very obvious that by neither the Act of 1907 nor the Act of 913 were the taxes to be paid by the appellant based on cost of in-tallation and, therefore, on valuation. In the 1907 Act, a tax of 100.00 per mile was imposed on overhead wires and $60.00 per mile n wires in underground conduits. It is a matter of common knowl-dge that the cost of underground conduits greatly exceeds that of verhead wires. So too, in the Act of 1913 by paragraph (c) the over-ead wires are made liable to an assessment of from $6,600 to $7,300 er mile, while by paragraph (E) wires in conduits or other under-ground construction are liable to an assessment of from $4,000 to $4,-00 per mile. It seems to be fairly inferable that the legislature ntended the additional burden occasioned by the use of the streets y overhead wires to be met by a higher license tax.

The method of arriving at the amount of the tax is unusual, but it s not to be condemned by that fact alone if it transgresses no con-stitutional requirement is not confiscatory and fairly meets the usual ests required for taxing measures. In the absence of binding or of the most persuasive authority, we are not inclined to say that an elas-ic privilege tax raising or lowering as the general tax on all indi-vidual citizens raises or lowers and in the same proportion is neces-sarily improper.

We are therefore of the opinion that the Act of 1913 imposed a privilege tax upon the plaintiff in error, based in part at least, upon the use and occupation of the public streets.

The foregoing conclusion is borne out by another view of the Act of 1913. By the first section of the Act, the public utilities therein mentioned "located on the public streets of the City of Wilmington or on private property not otherwise taxed" are subject to the assess-ment set out in said Act. Whatever implication arises from the quoted words as indicating that a general real estate assessment and tax is intended, is negatived, especially insofar as the plaintiff in error is concerned, by the method of arriving at the tax. Annually a sworn statement must be filed by each of the named utilities. In the case of a street railway alone is it required to give the number of miles of track in the City of Wilmington. In the case of every other utility it is only required to give the number of miles of the streets of the City of Wilmington used in the business of the said utility. On the basis of this number of miles of streets used is fixed, as we conceive, the tax for the license or the privilege of using said streets.

39 The only remaining question therefore is, whether or not the license fee or privilege tax imposed by the Act of 1913 is so excessive as to be confiscatory. This question was not argued before this court and indeed there is nothing in the record to sustain such an argument or to give this Court any assistance in arriving at a conclusion. The case comes before this Court on a demurrer to a declaration. There are no admitted facts of valuation, and there is no evidence in the case. This Court, therefore, does not pass upon this question, and the judgment of the Court below is affirmed.

40 **Clerk's Certificate.**

STATE OF DELAWARE,
Kent County, ss:

I, Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware, do hereby certify that the above and foregoing is a true copy of the Opinion of the Supreme Court of the State of Delaware, filed in the above-stated case. Daniel M. Ridgely, Clerk of the Supreme Court of the State of Delaware. [Seal of the Supreme Court, Delaware.]

Endorsed on cover: File No. 29,522. Delaware Supreme Court. Term No. 972. New York, Philadelphia and Norfolk Telegraph Company, plaintiff in error, vs. John I. Dolan, collector of taxes for the southern district of the city of Wilmington. Filed April 5th, 1923. File No. 29,522.

No. 972275

FILED
APR 5 1923
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Petitioner,

versus

JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington,
Respondent.

Notice of Motion for Writ of Certiorari.

To John I. Dolan, Collector of taxes for the Southern District of the City of Wilmington, Respondent herein:

You are hereby notified that on Monday the day of April 1923 at the opening of Court on that day, or as soon thereafter as counsel may be heard, a motion for a Writ of Certiorari, of which a copy is annexed hereto, will be submitted to the Supreme Court of the United States at Washington, D. C., for the decision of the Court thereon. In support of said motion a Petition and Brief will also be submitted to the Court and copies of same are herewith served upon you.

WILLIAM C. FITTS,
HORACE GREELEY EASTBURN,
OVERTON HARRIS,
Attorneys and Counsel for Petitioner.

Service and delivery of the foregoing Notice, Motion, Petition and Brief are hereby acknowledged this day of 1923.

.....
Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY, Petitioner, *versus* JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington, Respondent.	Motion for Writ of Certiorari.

Now comes the New York, Philadelphia & Norfolk Telegraph Company by William C. Fitts, Horace Greeley Eastburn and Overton Harris its attorneys, and moves this Honorable Court that it should by Writ of Certiorari or other proper process directed to the Honorable, the Judges of the Supreme Court of the State of Delaware, require said Court to certify to this Court for its review and determination a certain cause in the said Supreme Court of Delaware lately pending, wherein the New York, Philadelphia & Norfolk Telegraph Company was plaintiff in error and John I. Dolan, Collector of taxes for the Southern District of the City of Wilmington, was defendant in error, being Number 8, January Term 1922 on the Docket of said Court, and to that end now tenders herewith its Petition and certified copy of the entire record in said cause in said Supreme Court of Delaware.

WILLIAM C. FITTS,
HORACE GREELEY EASTBURN,
OVERTON HARRIS,
Attorneys and Counsel for New York, Philadelphia, & Norfolk Telegraph Company, Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No.....

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Petitioner,

vs.

JOHN I. DOLAN, Collector of taxes for the Southern District of the City of Wilmington,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND GROUNDS IN SUPPORT THEREOF.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, the New York, Philadelphia & Norfolk Telegraph Company, prays a Writ of Certiorari to review a judgment, rendered 16 January, 1923, by the Supreme Court of Delaware, which is the highest Court of the State in which a decision in the suit could be had, in case No. 8 on the docket of that Court, in which case your petitioner was plaintiff in error and John I.

Dolan, Collector of Taxes for the Southern District of the City of Wilmington, was defendant in error. The said judgment of the Supreme Court of Delaware was against your petitioner and affirmed the judgment of the Superior Court of New Castle County, Delaware.

A writ of error from this court to review the said judgment of affirmance by the Supreme Court of Delaware was duly allowed by Mr. Justice Butler and filed with the clerk of this Court 14 March, 1923 and copies of the printed record, under supervision of the clerk, are on file in the Clerk's Office. The writ of error was allowed under Section 237 of the Judicial Code, as amended by the Act of Congress of September 6th, 1916, giving right to an appeal or writ of error to this Court in cases wherein is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity.

This petition for a writ of certiorari is filed within the time limited by law for applying for such writ as a precaution in the event it should be held by this Court that the writ of error does not lie.

Statement of the Case.

An action was brought on the 10th day of March, 1917, in the Superior Court of Delaware (for New Castle County) by the Tax Collector of the City of Wilmington to recover certain taxes assessed by the City against the New York, Philadelphia & Norfolk Telegraph Company under specified statutes of Delaware, which provide for the taxation of specified public utility corporations, including telegraph companies.

These statutes, as contended by your petitioner, attempt to assess an excise tax upon the property of your petitioner and at a rate and upon a minimum valuation

which is arbitrarily fixed in the statute without any reasonable relation to the actual value of the property taxed. Stated briefly, the Delaware Statute provides that all pole lines in the streets of Wilmington "shall be assessed per mile or fraction thereof for each mile of the streets used, *but such assessment shall not be less than six thousand and six hundred dollars and not more than seven thousand and three hundred dollars per mile.*"

Your petitioner (defendant in the Superior Court of Delaware) filed its General Demurrer to the respondent's (plaintiff in the Superior Court) Narr or declaration and, in support of the Demurrer, contended that the Delaware Statutes, by this assessment, deprived this petitioner of its property without due process of law and denied to it the equal protection of the laws, contrary to the 5th and 14th Amendments to the Constitution of the United States.

The Supreme Court of Delaware in Banc on the 1st day of June, 1921 overruled this Demurrer without opinion rendered; and, your petitioner electing not to plead further, final judgment was rendered in favor of the respondent for the full amount of the taxes claimed.

Thereupon, your petitioner prosecuted its Writ of Error from said judgment of the Superior Court of Delaware to the Supreme Court of Delaware, which is the highest Court of the State in which a decision of the statute could be had and assigned as error, inter alia, the refusal of the Trial Court to decide that said statutes deprived your petitioner of its property without due process of law and denied to it the equal protection of the laws.

Said Supreme Court of Delaware on the 16th day of January, 1923 affirmed the judgment of the Trial Court and stated in its written opinion filed that the Delaware Statutes were valid because the tax they provided for was not in derogation of the Constitution of the United

States because arbitrary or confiscatory. The Court based this conclusion upon its opinion that the tax was not a tax upon your petitioner's property but upon its privilege of doing business in the City of Wilmington.

Grounds for the Petition.

The basis for this Petition for Certiorari is Section 237 of the Judicial Code as amended by the Act of Congress of 6 September, 1916, wherein it is provided that where a title, right, privilege or immunity is claimed under the United States Constitution and the decision is either in favor of or against same, it shall be competent for this Court to require, by certiorari or otherwise, that the cause be certified to it for review. The privilege and immunity claimed by your petitioner under the United States Constitution is the privilege afforded by the equal protection of the laws and the immunity against the deprivation of its property without due process of law, as provided for in the 5th Amendment and First Section of the 14th Amendment to the Constitution of the United States. By its judgment, aforesaid, the Supreme Court of Delaware, which is the highest Court of that State in which a decision in the suit could be had, has decided against the aforesaid privilege and immunity.

The Delaware Court sustained the validity of the Delaware Statutes upon the ground that they provide for a privilege tax and not a property tax. The nature of the tax imposed by the Statutes determines the applicability of those Federal constitutional principles which we rely upon, as having been violated. We contend that the Delaware Statutes impose a tax upon property and that as such they deprive the owner of his property without due process of law and also deprive him of the equal protection of the law. Our argument may be stated under the following topics:

I. The State Court cannot, by its construction of the State Statute, arbitrarily label that Statute a license tax and impose upon this Court acceptance of that label. Where a Federal question depends upon the construction to be placed upon the State Statute this Court exercises an independent discretion in determining that construction. See, St. Louis Cotton Compress Company vs. Arkansas, decided 4 December, 1922, and reported in Lawyers Cooperative Publishing Company's advance sheets, Vol. 67, number 5, page 138, containing the following language:

> "The Supreme Court (of Arkansas) justified the imposition as an occupation tax * * *. But this Court, although bound by the construction that the Supreme Court may put upon the Statute, is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect."

II. The constitutionality of the Delaware Statutes was properly raised before the State Court because

> (a) under the Delaware practice, the general demurrer is in use and raises all questions of the legal validity of pleadings to which it is directed;
>
> (b) the record fully discloses that the Equal Protectioin and Due process Clauses of the United States Constitution were relied on by your petitioner as plaintiff in error before the Supreme Court of Delaware; and
>
> (c) the head note to the opinion of the Supreme Court of Delaware, prepared by the Court itself, admits that: "The demurrer raised questions as to the construction and constitutionality of the Act under which the taxes were laid."

III. The Delaware Statutes impose a tax upon the property of specified public utility corporations and this clearly appears on the face of the Acts:

"All real estate within the said City shall be assessed * * *.

"All street railway lines, all gas mains, all electric light poles and wires, all telephone or telegraph poles and wires, * * * located on the public streets in the City of Wilmington or on private property not otherwise taxed * * * shall be assessed in the following manner.

"All electric light, telephone or telegraph poles and wires overhead * * * located in the streets of Wilmington shall be assessed per mile or fraction thereof for each mile of the street used, but such assessment shall not be less than six thousand and six hundred dollars and not more than seven thousand and three hundred dollars per mile."

IV. The taxed property is assessed at an amount which is arbitrarily fixed by the Legislature without any reasonable relation to the actual value of the property. This arbitrary valuation of the property is confiscatory and also discriminatory.

The Constitution and Statutes of Delaware provide a uniform and reasonable method of taxation of all property, other than the public utility property (including telegraph pole lines) specified in the Acts complained of, based upon an assessment having a proper relation to the actual value of the property, and affording the property owner an opportunity to be heard in the matter of the assessment. But in the specified class of public utility property (including telegraph pole lines) this general method of taxation is departed from, to the extent that telegraph pole lines in Wilmington are arbitrarily assessed at a fixed minimum value bearing no relation to the actual value of the property and without an opportunity being given the owner to be heard in the matter.

Our contention is that this discrimination renders the Delaware Statutes, which are the basis of the judgment herein complained of, invalid, as repugnant to the Constitution of the United States.

Conclusion.

We respectfully suggest that consideration of this application be postponed until the decision on the writ of error in regular course, and submit that in the event the writ of error be held not to lie, that then the case is a proper one for award of the writ of certiorari which, in that contingency, is respectfully prayed for.

And your petitioner will ever pray.

William C. Fitts,
Horace Greeley Eastburn,
Overton Harris,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1923—No. 275

SYNOPSIS AND INDEX

American Sugar Refining Co. v. Louisiana, 179 U. S. 88;
Bethlehem Motors Corpn. v. Flynt, 256 U. S. 421;
Traux v. Corrigan, 257 U. S. 312;
Haavik v. Alaska Packers Association, U. S. ;
Jones v. Union Guano Co., U. S. ;
Packard v. Banton, U. S. ;
Porterfield v. Webb, U. S. ;
Puget Sound Power & Light Co. v. King County, U. S. ;
Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232;
Radice v. New York, U. S. .

SUPREME COURT OF THE UNITED STATES

October Term, 1922—No. 972

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-error,

—*versus*—

JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington.

BRIEF FOR PLAINTIFF-IN-ERROR

I—Statement

This is a writ of error to a judgment of the Supreme Court of Delaware, which is the highest court of that state, wherein is established the validity of a Delaware statute providing for the payment of a tax by certain corporations, among them the New York, Philadelphia & Norfolk Telegraph Company. The telegraph company, in the court below, challenged the validity of the state statute upon the ground that it violated the 14th Amendment of the Constitution of the United States in that it deprived the company of its property without due process of law and denied to it the equal protection of the

laws. The judgment here reviewed was rendered 16 January, 1922. This writ of error was duly allowed by Mr. Justice Butler on 14 March, 1923, and superseded the judgment rendered less than 60 days previously.

II—The Facts

The City Charter of Wilmington is contained in Volume 17, Chapter 207 of the Laws of Delaware.

Section 80 thereof provides for the assessment of real estate in the city. The original act simply provided that all real estate should be assessed at a certain rate "upon every $100 of the estimated (cash) value of the property assessed." By the Act of 25 March, 1907 (Volume 24, Chapter 177, Section 16, Laws of Delaware) this Section 80 was first amended; and was again amended by the Act of 7 April, 1913 (Volume 27, Chapter 205, Laws of Delaware). The first amendment (1907) provided (as far as this case is concerned) for the payment by telegraph companies of a yearly tax of $100 per mile of overhead wires and $60 per mile of underground wires. The second amendment (1913) expressly repealed the former amendment in so far as it was inconsistent and inserted into the original act at the same place that the first amendment had been inserted, the language which is the subject of this litigation. By it all telegraph poles and wires located in the city streets are arbitrarily assessed at not less than $6600 or more than $7300 per mile. That is, the original act has been amended twice at the same place: the

first amendment providing for payment by telegraph companies of an annual tax of $100 per mile of overhead wires and $60 per mile of underground wires, and the second amendment repealing the first and providing for the arbitrary assessment of all pole lines, to be taxed on that valuation at a rate fixed by the municipality.

At this point, it will be convenient to quote from the various acts which directly affect the issue in this case and to simply refer to others which have only an indirect bearing on the question. The Wilmington City Charter (Volume 17, Chapter 207, Laws of Delaware) is a long general act of 152 sections whose title is: "An act to revise and consolidate the statutes relating to the City of Wilmington." Those sections of that act which pertain to taxation are as follows:

Sections 73-5 provide for a Board of Assessment, Revision and Appeals to be elected by the City Council.

Section 76 gives this board general supervisory power over the assessors and collectors and charges it with the enforcement of "a faithful, full, fair and complete assessment of all the property" in the city.

Section 77 provides for assessors and collectors of city taxes.

Section 80, as originally written, is set out verbatim:

"All real estate within the said city shall

be assessed, except real estate belonging to the United States, the State of Delaware, New Castle County, or the City of Wilmington, cemeteries and burying grounds, churches and meeting houses belonging to any religious society and used for public worship, real estate owned and used for charitable purposes by the associations known as the 'Trustees of the Home for Friendless and Destitute Children, in the City of Wilmington,' 'Home for Aged Women,' 'Sisters of Charity,' and buildings owned and occupied by fire companies. The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so *pro rata*. The real estate shall be described with sufficient particularity to be clearly identified, the principal mprovements thereon, if any, to be also specified. Real estate, the owner or owners of which cannot be found or ascertained may be assessed to 'owner unknown.' Every male citizen above the age of twenty-one years shall be rated for a capitation or poll-tax in addition to the assessments of his real estate, at a capital not exceeding two thousand dollars nor less than one hundred dollars.''

Sections 81 and 82 provide that the assessments shall be delivered to the board who shall hear complaints from the property owners, with power to revise the assessments.

Sections 82 and 84 provide that taxes for general city and school purposes shall be levied by the city, at a rate fixed by it, upon the assessed value of realty in the city.

Section 100 provides:

> "The Mayor and Council of Wilmington shall have power and authority to levy and collect taxes upon all telegraph, telephone and electric light poles and other erections of like character erected within the limits of the City of Wilmington, and the council may, by ordinance, prescribe the mode of levying and collecting the same. In case any of the owners or lessees of any such poles or erections, erected within said city shall refuse or neglect to pay the taxes that may be levied upon such poles, the council shall have authority to cause the same to be removed and may institute suit to recover the amount of taxes so levied and the expenses incident to the removal of such poles or erections."

The Amendment of 1907, simply inserted between the words "companies" and "the" in Section 80 of the original act a provision that:

> "The Mayor and Council of Wilmington be and it is hereby given express authority to collect and receive annually from telegraph, telephone • • • companies operating within the City of Wilmington the taxes hereinafter specified: • • •
>
> (d) from all persons, firms, associations

or corporations owning or operating any telephone or telegraph company business within the limits of the City of Wilmington, the sum of $100 per mile for each mile of the streets of said city used by said telephone or telegraph company for its wires and poles overhead * * *

(e) the sum of $60 per mile for each mile of the streets of said city used by any such company for underground conduits."

It was further provided that this tax was in lieu of all other taxes and licenses upon the equipment of said companies.

The Amendment of 1913 is found in Volume 27, Chapter 205, Laws of Delaware. It provides:

"*Section 1.* That Section 80, Chapter 207, Volume 17, Laws of Delaware, be and the same is hereby amended by inserting in said Section 80 between the words 'companies' in the tenth line of said section, and the word 'every' in the eighteenth line of said section, the following, viz:

All street railway lines, all gas mains, all electric light poles and wires, all telephone or telegraph poles and wires, all poles and wires used in transmitting heat, light or power, all pipes, conduits, wires or other underground construction used as electric light, teleghone or telegraph lines or in transmitting electric light, heat or power and all pipes or conduits used in carrying water located on the public streets in the

City of Wilmington or on private property not otherwise taxed excepting those now exempted from taxation by law shall be assessed in the following manner:" * * *

"(c) All electric light, telephone or telegraph poles and wires overhead, used as electric light, telephone or telegraph lines, located in the streets of the City of Wilmington, shall be assessed per pole or fraction thereof for each mile of the streets used, but such assessment shall not be less than $6600 and not more than $7300 per mile."

Then follows a provision that telephone, telegraph or electric light underground construction shall be assessed at not less than $4000 or more than $4400 per mile. It is then provided that every person owning or operating telegraph lines in the city shall file with the city a statement setting out the number of miles of the city streets used by such person overhead and underground.

"Such taxes shall be due and payable to the Mayor and Council of Wilmington annually, at the same time that the city and school taxes due said city are payable, and shall be subject to the same rebates, deductions, discounts, allowances and penalties as are now or hereafter may be provided by law in reference to such city and school taxes.

The assessment of real estate shall be made according to a certain rate in and upon every $100 of the estimated value of

> the property assessed, if sold for cash, and so *pro rata*. All assessments upon real estate shall be so made as to show separately the valuation of the improvements upon and the total valuation of the property assessed, and such property shall be described with such particularity as will enable it to be clearly identified and the name of the owner or last owner or reputed owner shall be given, if known."

It is then provided that the Board of Assessment, Revision and Appeals may make the first assessment upon the said property, at any time prior to a date given;

> "previous notice of such intended assessment, designating the time at which the same will be made, being given by the board in writing to the owner, owners, operator or operators of said property."

It is then provided that the Amendment of 1907 "in so far as it is inconsistent herewith, as well as other acts or parts of acts inconsistent herewith, are hereby repealed."

So, it is seen that the original act providing for the assessment of real estate in Wilmington (Section 80, Chapter 207, Volume 17, Laws of Delaware) was first amended in 1907 by inserting, between the words "companies" and "the" in the tenth line, provisions for the collection of an annual tax upon telegraph companies of a fixed dollar rate per mile of streets occupied. But as the 1913 Amendment directs

that it be inserted in Section 80 between the word "companies" in the tenth line and the word "Every" in the eighteenth line and expressly repeals the 1907 Amendment, in so far as the two are inconsistent, its effect is to strike out of Section 80 the 1907 Amendment and also the words of the original act between the word "companies" and the word "Every" and to substitute therefor the 1913 Amendment. At least, such is the construction of the Supreme Court of Delaware, in its decision of the case at bar (121 Atl. 18). And this construction of the Delaware Statute by the Supreme Court of Delaware conclusively establishes the meaning of the State act, so far as the State questions only are concerned. *Ward & Gow v. Krinsky,* 259 U. S. 503, also

Douglas v. Noble, 261 U. S. 165;
Des Moines National Bank v. Fairweather, decided 12 Nov. 1923;
Baker v. Druesdow, decided 12 November 1923;
Butters v. Oakland, decided 12 November 1923;
McGregor v. Hogan, decided 12 November 1923;
New York v. Jersawit, decided 3 December, 1923;
Cudahy Packing Co. v. Parramore, decided 10 December 1923;
First National Bank v. Missouri, decided 28 January 1924;

Raley & Brothers v. Richardson, decided 18 February 1924;
Puget Sound Power & Light Co. v. King County, decided 18 February 1924.

Therefore, Section 80 of the original act reads as it was originally written down to the word "companies," after which follows the 1913 Amendment and then the original act begins again at the word "Every". It may fairly be paraphrased as follows:

Section 1. First comes the opening sentence in the original act, that all real estate within the city shall be assessed. Then follows the amending act to the effect that: All telegraph poles and wires located in the city streets shall be assessed at not less than $6600 or more than $7300 per mile of streets used; and conduits so used shall be assessed at not less than $4000 or more than $4400. The assessment shall be against either the owner or operator of the property, but not against both. The owner or operator of telegraph lines in the city shall file a statement showing the total number of miles of city streets occupied overhead or underground. The tax herein provided for shall be due at the same time and according to the same rules as are the general city and school taxes, i. e., all other city property taxes. The assessment of real estate shall be made according to a certain rate "on every $100 of the estimated value of the property assessed, if sold for cash," i. e., the assessment shall be based on the esti-

mated cash value of the property. All real estate assessed shall be accurately described and the value of improvements shall be separately assessed. The Board of Assessment, Revision and Appeals shall plat all of the real estate in the city for use as tax maps and shall have the right to examine all county records relating to real and personal property subject to taxation.

Section 2. The board may make the first assessment upon the property named in this act on or before May 1st, on notice previously furnished the owner.

Section 3. The amendment of 1907 and all other acts and parts of acts are expressly repealed, in so far as they are inconsistent herewith.

Then follows the concluding provision of the original act, that every adult male citizen shall be liable for a poll-tax in addition to his real property tax.

Section 100 of the charter, being inconsistent with the 1913 Amendment to Section 80, is, therefore, repealed and non-existent.

III—History of Litigation

In March, 1919, the collector of taxes brought an action on behalf of the City of Wilmington against this telegraph company in the Superior Court, seeking to recover taxes for the years 1913-18 inclusive, due under the Tax Statute above set out; the company's pole line having been arbitrarily assessed at $7300 per mile of street occupied. To the Collector's Narr (dec-

laration), the defendant telegraph company filed a general demurrer which was heard by the Superior Court in Banc and was thereafter by it overruled, 1 June 1921. The Telegraph Company declined to plead over, but stood upon its demurrer, whereupon final judgment was rendered, 1 June 1921, against the Telegrah Company and in favor of the city for $2771.26 with interest and costs.

This judgment of the Superior Court was taken on writ of error to the Supreme Court of Delaware, the Telegraph Company specifically assigning as error the refusal of the trial court to declare the Delaware tax statute void under the 14th Amendment of the Constitution of the United States, as depriving the company of its property without the due process of law and denying to it the equal protection of the laws. Judgment of the trial court was duly affirmed, after written opinion, by the Supreme Court of Delaware on 16 January 1923.

A writ of error from this court to the Supreme Court of Delaware was allowed by Mr. Justice Butler and the writ and citation were issued on 14 March 1923. The petition for the writ, assignment of errors and the bond and service of the citation were filed in the state court and certified copies thereof filed in this court on 16 March 1923.

IV—ARGUMENT

1—On the Facts

The Delaware statute provides for a property tax. To construe the statute as a license or privilege tax would do violence to the simple language used and ignore this glaring fact: of the two statutes with which we principally have to do, the first is that section of the City Charter which provides generally for the taxation of real property, and the second is amendatory of and inserted bodily into the first and deals with the taxation of telegraph property. How can it reasonably be said that the legislature would consciously insert bodily into and as an amendment of a property tax statute a piece of legislation foreign to the general subject dealt with, such as a license tax would necessarily be?

The tax provided by the Delaware Legislature must either be a tax on the property of this Telegraph Company or a tax on the privilege of doing a telegraph business The language used by the legislature is plain and unambiguous. There is, we submit, no reasonable doubt that the tax provided for is imposed upon the physical property of telegraph companies and the other corporations specified in Section 80 as amended.

It cannot reasonably be doubted that telegraph pole lines are real estate. Section 80, which provides for the taxation of telegraph pole lines, refers to nothing else; the word "real estate" appears seven times in its twenty-two lines. Telegraph property and general real estate ap-

pear in the same statute; the same rate of taxation is made applicable to both and the same method of assessment applies to both. As telegraph property is specifically enumerated in a statute which deals with nothing else but real estate, and the rate of taxation applicable to telegraph companies, property is the rate applicable to real estate generally, therefore, if telegraph pole lines are not real estate, then they cannot be taxed under this statute at all. But whether they be realty or personalty they most certainly are property of some kind or other; and they have arbitrarily been assessed by a method contrary to the general method applied to property by the state law, viz., an assessment based on the estimated cash value of the property.

The taxation provided for by Section 80 of the Wilmington Charter has not the remotest semblance of a license fee or privilege tax. The existence of Section 100 of the charter giving the city specific authority to levy and collect taxes upon telegraph structures does not change Section 80 into something which it otherwise would not be; because Section 100 authorizes the city to tax telegraph property does not change Section 80, which also authorizes the city to tax telegraph property, into a tax upon the privilege of doing a telegraph business. The charter as it was originally written provided in Section 80 simply for the general method of assessing the value of real estate; and in Section 100 it specifically authorized the city to tax telegraph property according to a method to be described by the City Council

When the legislature, in 1913, amended Section 80 by adding to it specific directions as to the method of assessing the value of property of telegraph and other companies, it thereby either intentionally or unintentionally encroached upon the limits of Section 100. Since 1913, both Section 80 and Section 100 has authorized the taxation of telegraph property. But the 1913 Amendment to Section 80 expressly repeals all inconsistent acts or parts of acts and so this eliminates Section 100.

When Section 80 was first amended, in 1907, the result of that amendment may have been the creation of a license tax, rather than a tax on property; but the Supreme Court of Delaware has expressly decided that it is repealed; and so it may be forgot. *Ward v. Krinsky, supra.*

The Wilmington Charter is a general law providing for the collection of city taxes. This charter is a long act of 152 sections, but those provisions which in any way pertain to taxation are comparatively few. Those sections provide for the assessment of city real estate by assessors and collectors; and a Board of Assessment, Revision and Appeals is provided to supervise and enforce justice in the assessment of all city property. To this end, it is further provided that the assessments of all property shall be reported to that board which is given power to revise the assessments upon complaint by the property owners who shall be heard at a meeting of the board of which they shall have notice. In this way, general property owners are given their "day in court" which, as we shall see in

a moment, is denied to the owners of certain specified property, including telegraph companies. Later on in the charter is found a provision expressly authorizing the city to tax telegraph property according to regulations to be prescribed by the City Council, but this was repealed by the 1913 Amendment to Section 80.

But it is Section 80 of the City Charter which gives us principal concern. As originally written, it simply provided that all real estate within the city should be taxed at a certain rate on every $100 of its cash value. This section is now amended to provide that telegraph property is separately valued by the legislature itself, and on this valuation, the general tax rate is applied. This Section 80 provides a general scheme for the assessment of taxable property in the city. Property other than that of telegraph companies (and certain other specified corporations) is assessed upon its estimated cash value, with an opportunity for the owner to be heard on that question—a general method of assessment existing in Delaware since the Colonial period. This method of assessment was provided in Section 80 as it was originally written and is also found in that section as it is now amended; and it is now the method in general use in Delaware except as to telegraph companies and the few other corporations singled out by the statute; but as to the property of those companies, the legislature has, under that same section, arrogated to itself the power to fix arbitrarily its value, or at least its minimum value. Therefore, although the owners of gen-

eral real estate are furnished an opportunity to be heard upon the question of the amount of their assessment, this is denied to the owners of telegraph property; for the most that they can do is to contend for the minimum valuation of $6600 instead of the $7300 maximum, conclusively established by the statute. And it is cold comfort to secure the lesser valuation, when the property assessed is actually worth only about $500!

The separation of telegraph property into a class to be valued in a special way is not a reasonable classification. In this general statute dealing with the taxation of all real property in the city and applying to all real property the same rate per $100 of value, telegraph property (and a few other kinds) is specially set aside for this discrimination, viz., in determining its value to which the common rate shall apply, a different and arbitrary method must be used. There is and can be no justification for such a drastic distinction.

The existence of Section 100 of the Charter, authorizing the city to tax telegraph property according to a mode to be determined by the City Council, was not antagonistic to Section 80 as originally written. This Section 100 was written when Section 80 contained nothing more than a bare provision that all realty should be assessed (that is, taxed) at a certain rate per $100 of its estimated cash value; at which time there was no infringement on Section 100 by Section 80. It was not until 1913 that the Legislature amended Section 80 and specifically

provided a minimum and maximum valuation of telegraph property, to be taxed thereon at the old "certain rate"; i. e., the same tax rate is now applied to the valuation fixed by the statute as formerly applied to the estimated cash value of the property. To the extent that the amendment to Section 80 specifically provides for the valuation of telegraph property and its taxation thereon at the old general rate, it infringes upon Section 100 which simply authorizes the city to tax telegraph property by a method to be determined by the City Council.

Whatever construction one chooses to place upon the situation, the fact remains that the Delaware Legislature, either intentionally or unintentionally, has twice covered the ground of telegraph property taxation. If Section 100 is now inconsistent with Section 80 as amended, it is expressly repealed by the terms of that later act. But whether inconsistent and therefore repealed, or not inconsistent and therefore extant, is immaterial to us because in neither event is Section 80 affected.

Summing up, let us say that:

> This Delaware statute effects a property tax; made so by the plain language and unmistakable intent.
>
> Telegraph structures constitute real estate; but if not, then personalty, for they certainly are some form of property.
>
> To the extent that Sections 80 and 100 of the City Charter are antagonistic or inconsistent, Section 100 is repealed.

The effect of this state law as a whole is to place telegraph property in a prejudicial classification.

IV

2—On the Law

(a) The Jurisdiction and Proceedure.

The Judicial Code, Section 237, as amended by the Act of 1916, provides that this court may re-examine and reverse, affirm or modify the final judgment of the highest court of the state "where is drawn in question * * * the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity." As the judgment to which this writ is directed was rendered by the highest court of Delaware and as the judgment is final in that it affirms the final judgment of the trial court directing the payment of the taxes complained of (*Davis v. Farmers Co-operative Equity,* 262 U. S. 312) and as the demurrer challenged the validity of a Delaware statute on the ground that it was repugnant to the 14th Amendment of the Constitution of the United States, it is evident that this court has jurisdiction of the cause and that the writ of error was properly allowed.

In *Dahnke-Walker Milling Company v. Bondurant,* 257 U. S. 282, 66 L. E. 239, the question for decision was the applicability to an interstate commercial transaction of a state statute

prescribing conditions under which a foreign corporation might do business in the state. The state court held that the statute was applicable and this court reversed that judgment on writ of error, saying:

> "The case is here on a writ of error and our jurisdiction is challenged. The objection is not that we are without power to review the judgment, but that it can be reviewed only on a writ of certiorari. The controlling statute is Section 237 of the Judicial Code, as amended by the Act of September 6, 1916. Besides confining our power of review in cases litigated in the state courts to those in which the decision of a Federal question is involved, this jurisdictional section provides that the review in cases falling within certain classes may be on writ of error and in others on writ of certiorari, the distinguishing or dividing line being drawn according to the nature of the Federal question and the way in which the state court decides it. • • •
>
> "In the state court, the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that, as to the transaction in question, the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but applied and enforced the statute. Of course, that was an affirmation of its validity when so applied. • • •

The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. If it be resolved in favor of the validity of the statute, the review may be on writ of error; and if it be resolved against the validity, the review can only be on writ of certiorari."

Prudential Insurance Company v. Cheek, 259 U. S. 530;
Zucht v. King, 260 U. S. 174;
Durham Public Service Company v. Durham, 261 U. S. 149;
Trenton v. New Jersey, 262 U. S. 182;
Madera Sugar Pine Co. v. Industrial Accident Commission, 262 U. S. 499;
Rooker v. Fidelity Trust Company, 261 U. S. 114;
Security Savings Bank v. California, decided 19 November, 1923;
Schwab v. Richardson, decided 12 November, 1923;
McGregor v. Hogan, decided 12 November, 1923;
Cudahy Packing Co. v. Parramore, decided 10 December, 1923;
La Coste v. Louisiana, decided 7 January, 1924.

It is equally evident, as the converse of the foregoing proposition, that the provision in Sec-

tion 237, to the effect that certiorari is the proper means of review where "any title, right, privilege or immunity is claimed under the Constitution" and the decision is either in favor of or against the same, is not applicable here and that the action of this court in denying that writ (applied for as a precautionary measure) was correct.

New York, Philadelphia and Norfolk Telegraph Company v. Dolan, 262 U. S. 748;

Federal Land Bank v. Crossland, decided on writ of error and certiorari denied, 261 U. S. 374;

Cudahy Packing Co. v. Parramore, decided on writ of error 260 U. S. 733, certiorari denied, 13 Nov. 1922;

Georgia Railway & Power Company v. College Park, decided on writ of error and certiorari denied, 262 U. S. 441.

(b) This Court is Not Bound by the State Court's Decision.

It will be noted that the Supreme Court of Delaware based its decision that this statute is valid upon the proposition that "the payment required to be made by telegraph companies is in the way of a license fee and is not a real estate assessment and tax." But the mere fact that the Delaware Court has labelled this statute a license tax does not make it so. This court is not controlled by that decision of the state court but will determine the question for itself. If the statute imposes a property tax, then it is

clearly unconstitutional because it denies to the property owner and taxpayer that opportunity to be heard as to the value of his property which the law guarantees him. But if the statute imposes only a license tax, then this constitutional defect does not obtain. Therefore, a constitutional question is necessarily involved in deciding the nature of the tax effected by the Delaware statute, and so this court will decide that question for itself untrammeled by the decision of the state court. Otherwise, a state court might arbitrarily preclude from this court those very questions of constitutional law for whose decision it was originally created.

St. Louis Cotton Compress Company v. Arkansas, 260 U. S. 346, 67 L. E. 297, was decided on writ of error to the Supreme Court of Arkansas to review a judgment sustaining a statute authorizing the recovery back by Arkansas citizens of a portion of all insurance premiums paid to foreign insurance companies. The statute was attacked as denying to the plaintiff corporation rights guaranteed by the 14th Amendment. The Arkansas court sustained the statute as an occupation tax, but this court reversed the judgment, saying that the statute constituted no tax at all but a penalty. The court, by Mr. Justice Holmes, said:

> "The Supreme Court [of Arkansas] justified the imposition as an occupation tax—that is, as we understand it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the Supreme Court may put upon the statute,

> is not bound by the characterization of it so far as that characterization may bear upon the question of its constitutional effect."

As authority for this proposition the opinion cites: *St. Louis Southwestern Railroad Company v. Arkansas,* 253 U. S. 350, 59 L. E. 265, in error to the Supreme Court of Arkansas to review a decree enforcing the State Franchise Tax Statute which had been challenged as invalid under the Commerce Clause and the 14th Amendment. The state court had construed the tax to be a charge for the right to exist as a corporation within the state, the amount of the charge being fixed solely by reference to the intrastate property. This was the determining question in the case, viz., was the tax levied upon intrastate property only or did it include interstate commerce. The opinion by Mr. Justice Pitney states:

> "Upon the mere question of construction we are, of course, concluded by the decision of the State Court of Last Resort. But when the question is whether a tax imposed by a statute deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

The court then goes on to say that "We, therefore, accept the construction" of the act by the state court to the effect that the act constituted a tax upon the company's franchise based on the valuation of the company's property within the state, but:

> "By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intrastate business * * *."

And so it is apparent that the construction of the statute by the state court which was binding upon this court involved merely a state and not a federal question, viz., did the state legislature intend to tax only the intrastate property of the corporation?

Another case in point is *Standard Oil Company v. Graves*, 249 U. S. 389, 63 L. E. 662, in error to the Supreme Court of Washington to review a decree sustaining the validity of an oil inspection fee statute. Suit had been brought to enjoin the collection of the inspection fee upon the ground that the statute was repugnant to the Commerce Clause of the United States Constitution. The state court, on demurrer, sustained the statute, but this court reversed the judgment, saying:

> "The Supreme Court of the state held that the tax was not upon property but could be sustained as an excise or occupation tax upon the business of selling oil within the state.

> While this court follows the decisions of the highest court of a state as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void."

In *Corn Products Refining Company v. Eddy*, 249 U. S. 427, 63 L. E. 689, in error to the Supreme Court of Kansas to review a decree sustaining the constitutionality of the State Pure Food Act, this court reversed the judgment of the state court upon the ground that the statute was repugnant to the commerce clause of the United States Constitution, saying:

> "In cases of this kind we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has any terms to be construed, but solely with the effect and operation of the law as put in force by the state."

And in *Mo. Pacific Railroad v. Ault*, 256 U. S. 554, 65 L. E. 1057, in error to the Superme Court of Arkansas to review a judgment against the director General of Railroads under a state statute, this court reversed the judgment of the state court which construed the enabling state statute to impose upon the railroads a tax rather than a penalty, saying:

> "But whether in a proceeding against the

director general it shall be deemed a tax or a penalty presents a question not of state but of federal law. "

Moreover, in determining the legal effect of the facts disclosed by the record, this court is not influenced by the conclusion reached by the state court, but decides that matter itself. In *Traux v. Corrigan*, 257 U. S. 312, 66 L. E. 254, this court reviewed a decision of a state court that the record facts failed to show any deprivation of property. The opinion states:

> "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state Supreme Court."

The case of *Scott v. McNeal*, 154 U. S. 34, 38 L. E. 897, is also germane. After publication of a notice of a petition for the appointment of an administrator of the estate of one who had disappeared for seven years, as provided in the state statute, the administrator was appointed and conveyed the property of the presumed and declared decedent. The owner subsequently appeared and contested the title under the conveyance from the administrator. The state court decided that the appointment of the administrator was binding upon the live man presumed to have been dead, saying that the notice provided by the state court was sufficient to constitute due process of law.

Held—The state court's construction of the state statute as constituting due process of law was not binding on the Supreme Court of the United States. The court said:

> "Upon a writ of error to review the judgment of the highest court of the state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory or of the state when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case this court must decide for itself the true construction of the statute."

There is a clear distinction between cases where the state court's construction of the state statute will preclude a federal question from decision by the Federal Supreme Court (as where the state court designates a tax and the designation necessarily carries with it immunities from certain requirements of the U. S. Constitution) and cases where the construction of the state statute by the state court yet leaves the Federal Supreme Court free to test the validity of the

statute under every provision of the U. S. Constitution which would have been applicable to the statute in the absence of its construction by the state court. In the first class of cases, the Federal Supreme Court is not bound by the state court's construction, because that construction carried with it a decision of the federal question; and in the latter class, it is bound by that construction, because it is still free to test the act, so construed, by all of the terms of the U. S. Constitution (*McGregor v. Hogan*, decided by this court, 12 November, 1923). In other words, where the state court's construction carries with it a decision of the statute's validity under the U. S. Constitution, the Federal Supreme Court is not bound thereby. But where the state court's construction leaves the statute's validity under the U. S. Constitution still open for decision by the Federal Supreme Court, it is bound thereby and must proceed to apply the federal test to the statute according to the meaning attached to the statute by the state court.

Putting it another way, the Federal Supreme Court is bound by what the state court says the statute means provided that meaning does not entail a necessary escape from some provision of the U. S. Constitution. The rule is tersely stated in this language of Mr. Justice Field, in *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. E. 569 (where this court accepted certain constructions by the state court of the State Tax Statute under review):

> "There being no federal question touching these matters, we follow the decision of

the state tribunals as to the construction and validity of the statutes."

In *Huntington v. Attrill*, 146 U. S. 657, 36 L. E. 1123, this court reversed the judgment of the state court and decided for itself the federal question that the state court had denied to the plaintiff in error the full faith and credit to which a judgment secured by him in New York was entitled.

There is a long line of decisions that where a statute is challenged as impairing the obligation of a contract, this court is not bound by the decision of the state court as to the existence and effect of the contract whose obligation is claimed to have been impaired, but will decide that question for itself. (Said in *Scott v. McNeal, supra*, to be only another instance where this court is not bound by the decision of the state court.) This proposition has been only recently affirmed in *Georgia Railway & Power Company v. Decatur*, 262 U. S. 432. There the railway company had made a contract by ordinance with the city not to charge more than a five cent fare on interurban traffic between Decatur and Atlanta. The company first challenged the right of the city under the State Constitution to make such a contract at all and then urged that if the contract was valid a subsequent state statute extending the application thereon impaired its obligation by increasing its burden. This court said that it was bound by the state court decisions sustaining the right of the city under the State Constitution to make

a rate contract, for that was a question of state law. But:

> "On the other hand, in deciding the constitutional question presented, this court will determine for itself whether there is in effect a contract, and if so, the extent of its binding obligations; but will lean to an agreement with the state court."

The judgment of the state court was then reversed because, although the rate contract ordinance was valid, yet the statute complained of did impair its obligation by increasing its burden on the Railway Company.

In *New York ex rel. Clyde v. Gilchrist*, 262 U. S. 94, this court said that:

> "when a statute is alleged to impair the obligation of a contract, this court must decide for itself whether there was a contract and what it was."

And:

> "we are not bound by the construction of the New York statutes by the New York courts in deciding the constitutional question."

In *Detroit United Railway v. Michigan*, 242 U. S. 238, 61 L. E. 268, this court said that:

> "it is too well settled to be open to further debate that where this court is called upon in the exercise of its jurisdiction to decide whether state legislation impairs the obli-

> gation of a contract, we are required to determine upon our independent judgment these questions: (1) Was there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?"

In *Atlantic Coast Line Railroad v. Goldsboro*, 232 U. S. 548, 58 L. E. 721, the railroad attacked a city ordinance as impairing the obligation of the company's charter contract with the state. The state court decided that the State Constitution reserved the right in the state to amend the charter. But this court decided that it must determine that fact for itself, saying:

> "But when this court has under review the judgment of a state court • • • and the validity of a state law is challenged on the ground that it impairs the obligation of a contract, this court must determine for itself the existence or non-existence of the asserted contract and whether its existence has been impaired."

See also:

Mobile Railroad v. Tennessee, 153 U. S. 485; 38 L. E. 793;
McCullough v. Virginia, 172 U. S. 102; 43 L. E. 382;
Douglas v. Kentucky, 160 U. S. 488; 42 L. E. 553;
Stearn v. Minnesota, 179 U. S. 223; 45 L. E. 162;

Northern Pacific Railway v. Minnesota, 208 U. S. 582; 52 L. E. 630;
Perry Company v. Norfolk, 220 U. S. 472; 55 L. E. 548.

In *Ward & Gow v. Krinsky*, 259 U. S. 503, appears this language:

> "In the exercise of our appellate jurisdiction, we are bound by the construction of the state law adopted by its court of last resort,"

but the explanation of this broad statement is that the construction of the state law referred to was the New York court's decision that the New York Workmen's Compensation Act applied to a particular kind of employment; it involved *only* a question of state law (as in *Douglas v. Noble*, 261 U. S. 165 and *Cudahy Packing Co. v. Parramore*, decided by this court 10 December, 1923; *New York v. Jersawit*, decided by this court 3 December, 1923; *First National Bank v. Missouri*, decided by this court 28 January 1924; *Raley & Bros. v. Richardson*, decided 18 Feb., 1924; *Puget Sound P. & L. Co. v. King County*, decided 18 Feb., 1924.)

In *Lacoste v. Louisiana*, decided 7 January, 1924, this court had under review the decision of a state court sustaining a state tax statute and the opinion contains this language:

> "This court will determine for itself what is the necessary operation and effect of a state law challenged on the ground that it

> interferes with or burdens interstate commerce. The name, description or characterization given it by the legislature or the courts of the state will not necessarily control. Regard must be had to the substance of the measure rather than its form."

This brings us to the discussion of the Delaware Statute itself.

(c) This is a Property Tax and is Illegal Because it Taxes the Taxpayer's Property Without Due Process of Law.

The proposition maintained is that the statute effects a tax on the property of telegraph companies and as such is invalid because (1) the arbitrary valuation of the property taxed is a denial of due process of law and (2) the collection of a tax computed in this unconstitutional manner amounts to a taking of property, to the extent of the tax paid.

That the collection of an illegal tax is a taking of the property of the taxpayer is a self-evident proposition. "The owner is not deprived of his property by 'the law of the land' if it is taken to satisfy an illegal tax". And so if this Delaware Statute does really provide for an illegal tax, then this telegraph company has been deprived of its property, within the meaning of the inhibition of the United States Constitution.

If the tax be in fact levied on property and not on the privilege of doing a telegraph business in the ctiy, then there can be no doubt that the arbitrary valuation placed by the state

on the property affected amounts to a denial of due process of law. To decree the value of property without any hearing or inquiry into the fact of its real value—to determine the value by mere legislative fiat—contravenes every canon of taxation and shocks the conscience. It requires but little effort to demonstrate these conclusions from that premise; but we must first establish the correctness of the premise.

It remains now to argue the character of this Delaware tax upon legal principles established by decided cases. The proposition maintained is that the tax is one upon property because: first, a telegraph pole line is real estate; second, if the tax be on the telegraph company's license or privilege to do business in the city, it is void because the statute fails to exclude government and interstate business; third, even if the tax be called a franchise tax, this makes it in reality a tax on the company's property enhanced in value by the company's federal franchise, itself exempt from state taxation—the State of Delaware not having granted the company any specific franchise.

The case of *Vane v. Newcombe,* 132 U. S. 220, 33 L. E. 310, involving the application of a mechanics lien, decides categorically that telegraph poles and wires constitute real estate. *Western Union v. Road Improvement District,* 220 S. W. (Ark.) 717, is to the same effect.

In *Pullman Company v. Richardson,* 261 U. S. 330, 67 L. E. 682, the state statute required all sleeping car companies "to pay to the state a tax upon their franchises * * * rolling stock

* * * and other property" and calculated the tax upon the gross receipts of the company derived from the operation of said property; moreover, it was specified that said tax should be in lieu of all other taxes on the property. Although this tax was nominally levied upon the company's receipts and although it was actually imposed upon the company's franchise, this court decided that the tax was a tax on the property specified and not on the receipts, the latter being merely the means of ascertaining the value of the property.

This tax provided by the Delaware Statute must be either upon property, upon a license or privilege, or upon a franchise. Our thought is that it is a tax upon property and illegal; but conceding, *arguendo,* that it be a tax on the license or privilege of the telegraph company to do business in the City of Wilmington, it is nevertheless illegal. For the statute is fatally defective in this, that it fails to exclude from its application the interstate or United States Government business done by the company. It has been held repeatedly that the only license or privilege which a city may lawfully grant or tax, is a license or privilege to do business within the city limits. *Postal Telegraph-Cable Company v. Charleston,* 153 U. S. 692, 38 L. E. 871; *Postal Telegraph-Cable Company v. Richmond,* 249 U. S. 252, 63 L. E. 590 and *Postal Telegraph-Cable Company v. Fremont,* 255 U. S. 124, 65 L. E. 545. It is a highly strained construction and one which does direct violence to plain language, common sense and certain intent to say that

this tax, imposed directly upon telegraph property, is in reality a tax upon the privilege of using that property. But if we are wrong and this construction is correct, nevertheless the tax on the privilege is nominally imposed upon and measured by the poles and wires and they are a part of a national telegraph system and carry interstate and government messages, as well as inter-city messages. Therefore, this tax, privilege tax though it be, is broader than its lawful foundation and is, therefore, void.

But if this Delaware tax be construed to be a tax on the telegraph company's franchise, then the case of *Western Union Telegraph Company v. Missouri ex rel. Gottlieb*, 190 U. S. 412, 47 L. E. 1116, is controlling. There, a state tax, imposed upon a telegraph company's pole lines, and under the heading "all other property," upon its franchise also, was sustained by this court. But the opinion carefully points out that the state tax was not imposed directly upon the franchise, but reached it only indirectly through the company's physical property in the state, the value of which property is enhanced by its relation to other property and property rights, such as franchises themselves beyond the reach of the state. It is only to the extent of this enhanced value of intrastate property, from its relation to other and exempt property, that the telegraph company's foreign franchise may be taxed. The opinion cites *Western Union Telegraph Company v. Massachusetts*, 125 U. S. 530, 31 L. E. 790, to support this theory. The Massachusetts case involved a tax on the company's

property within the state valued by proportioning its intrastate length to its interstate length; and in dismissing the company's contention that its federal franchise had been taxed, the court said that each state wherein the company operates may tax its property therein enhanced in value by the company's federal franchise which gives it the right to enter all states.

See also, *Pullman Co. v. Richardson, supra.*

In *Western Union Telegraph Company v. Wright*, 185 Fed. Rep., 250, the Fifth Circuit Court of Appeals decided, after referring to Gottlieb's case, that a tax imposed by a state directly upon a telegraph company's franchise derived from the Post Road Act was illegal.

Therefore, it is seen that the only way in which a telegraph company's foreign or federal franchise may be taxed is by the enhancement in value of its intrastate physical property, consequent upon the company's possession of those franchises. And so in effect it is a tax on property.

Moreover, this court has repeatedly decided that a public utility franchise is itself property.

In *Postal Telegraph-Cable Company v. Adams*, 155 U. S. 688, 39 L. E. 311, the State of Mississippi had imposed a tax of $3000 on each telegraph company operating 1000 miles of line within the state. The opinion refers to the tax as "so called privilege taxes" and sustained it because

"property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce may be taxed, or a tax imposed on the corporation on account of its property within a state and may take the form of a tax for the privilege of exercising its franchises within a state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state. * * * Doubtless no state could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use and by whatever name the exaction my be called. If it amounts to no more than the ordinary tax upon property or a just equivalent therefore ascertained by reference thereto, it is not open to attack as inconsistent with the constitution."

Because the state court said that the amount of this privilege tax was no more than the amount of tax which could have been imposed on the company's property, this court said:

"Being thus brought within the rule, the tax becomes substantially a mere tax on

> property and not one imposed on the privilege of doing interstate business."

In *Atlantic & Pacific Telegraph Company v. Philadelphia*, 190 U. S. 160, 47 L. E. 995, the court used this language in establishing the general principles applicable to privilege taxation:

> "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation provided at least the franchise is not derived from the United States."

In *Attorney General of Massachusetts v.* Western Union Telegraph Company, 141 U. S. 40, 35 L. E. 628, the state had imposed a franchise tax calculated on the value of that proportion of the capital stock represented by the ratio of the length of the company's lines within the state to the length of its entire line. It was held that this tax was valid because

> "by whatever name the tax may be called, as described in the Laws of Massachusetts, *it is essentially an excise upon the capital of the corporation.* • • • The tax, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts." (Italics ours.)

The two cases of *Boise Artisian etc. Water Company v. Boise City*, 230 U. S. 84, 57 L. E.

1400, and *Owensboro v. Cumberland Telephone Company*, 230 U. S. 57, 57 L. E. 1389, also establish the general proposition that a public utility franchise is a part of the property of the grantee corporation. This language appears in the opinion in the Owensboro case:

> "That an oridnance granting the right to place and maintain upon the streets of a city, poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases."

Frankness requires the admission that in Gottlieb's case and some of the others, *supra*, the telegraph company's franchise was not derived from the state which levied the tax, whereas this plaintiff in error derives its domestic franchise from the State of Delaware (this fact being probably admitted by the demurrer to the declaration); and so if this tax be a tax on the company's franchise, it may be said to be on the franchise to be a corporation, granted by Delaware itself. Whereas the state doubtless has the right to tax this mere authorization to be a corporation, such a mere organization tax would not, we submit, have taken the elaborate form of the 1913 Amendment to Section 80 of the Wilmington Charter, which deals with city taxes. The most that Delaware has granted to this telegraph company is its corporate existence, its right to be a corporation. It has not granted the company any specific franchise to do a particular thing or to enjoy a particular

privilege (as was the case in *Western Union Telegraph Company v. Hopkins*, 160 California 106, where the company was granted the right to occupy the city streets free of taxation). And so it cannot reasonably be said that the tax imposed in Section 80 of the Wilmington Charter is a tax upon the telegraph company's franchise to be a corporation.

This branch of our argument may be summed up as follows:

The tax under consideration is a tax on property because it is levied upon plaintiff in error's pole line which is real estate or at least property of some kind. But if it be construed to be a mere license tax, it is void because it is not limited to the license to do intra-city business only. The only franchise granted this company by Delaware is the mere right to be a corporation and the tax under consideration cannot reasonably be said to be levied upon such a privilege. But if this tax be construed to be imposed upon some specific Delaware franchise of which we are not aware, then it is in reality upon a form of corporate property and, therefore, governed by rules applicable to property taxation.

Having, we hope, established that this Delaware Statute effects a tax on the property of this telegraph company, and the fact that collection of an illegal tax amounts to a deprivation of property requiring no demonstration, we now pass to a discussion of the "due process" clause.

That a corporation is a person within the

meaning of both the Due Process and Equal Protection clauses of the constitution has been only recently reiterated by this court in *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U. S. 544.

Nor can there be any doubt that due process of law requires that the property owning taxpayer be afforded by the taxing authorities an opportunity to be heard upon the question of the value of this property proposed for taxation.

Truax v. Corrigan, 257 U. S. 312, 66 L. E. 254, contains this statement:

> "The Due Process Clause requires that every man shall have the protection of his day in court and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

In *McGregor v. Hogan*, decided 12 November, 1923, this court reviewed the judgment of a state court denying the taxpayer's claim that a certain tax statute deprived him of his property without due process of law, because the state authorities had assessed his property without giving him an opportunity to show its real value. The fact was that the state statute, although it did not give the property owner an opportunity to be heard when his property

was first assessed, yet it did give him that opportunity before the assessment became final. This court recognized the property owner's right to his day in court in the following language:

> "It is not essential to due process of law that a taxpayer be given notice and hearing before the value of his property is originally assessed, it being sufficient if he is granted the right to be heard on the assessment before the valuation is finally determined (cases cited). *The requirement of due process is that after such notice as may be appropriate, the taxpayers have opportunity to be heard as to the amount of the tax by giving them the right to appear for that purpose at some stage of the proceeding before the tax becomes irrevocably fixed* (cases cited). And since this act, although not providing for notice and hearing before the assessment by the Board of Assessors, grants the taxpayer, after due notice, the right to a hearing before arbitrators who shall finally assess and fix the valuation of his property, we find in its provisions no want of that notice and hearing which are essential to due process" (italics ours).

In the case at bar, this hearing is without real benefit because the statute fixes the minimum value of the property.

In *Londoner v. Denver*, 210 U. S. 373, 52 L. E. 1103, this court said:

"In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the constitution does impose, this court has regarded substance, and not form. But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he shall have notice, either personal, by publication, or by a law fixing the time and place of the hearing. * * * Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."

See also *P. C. C. & St. L. R. R. Co. v. Backus*, 154 U. S. 421, 38 L. E. 1031.

In *Hagar v. Reclamation District*, 111 U. S. 701, 28 L. E. 569, this court had before it a statute of California, wherein certain swamp

lands were to be reclaimed and the costs thereof assessed against the property owners proportionate to the benefit accruing to them from the work. The statute provided that the tax should be assessed by commissioners after viewing the property affected; but the assessment was not self-executing and could be enforced only by separate legal proceedings "and, of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them, he may set forth by way of defense all his grievances."

The plaintiff Hagar contested the validity of the assessment, claiming that the failure of the statute to provide notice to the property owner of the assessment violated the due process clause of the United States Constitution. This court, through Mr. Justice Field, replied that due process of law was provided because, although the property was assessed without notice to the owner, yet that assessment could not be enforced except by separate legal action of which the property owner must have notice, and in which action he could raise all defenses to the assessment which he might have. Upon the general question as to the right of a property owner to notice of a tax assessment, the court pointed out the distinction between privilege and property taxes, saying:

> "where the taking of property is in the enforcement of a tax, its proceeding is necessarily less formal [than where life or liberty is taken by judicial proceeding] and

> whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determined."

Certain taxes such as poll taxes or privilege taxes are in themselves simply an arbitrary price demanded by the government for certain benefits and privileges accorded its citizens and no notice of the assessment or the amount of the tax is required by law, because the taxpayer would be unable to attack the amount of the assessment if he were notifed of it in advance.

> "In such cases, there is no necessity for notice or hearing. The amount of the tax would not be changed by it."

The opinion then states:

> "But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in"

and the taxpayer must be afforded notice and an opportunity to be heard either before a Board of Equalization and Review or in the courts in a separate legal action to enforce the assessment.

This doctrine was also maintainel in *Davidson v. Board of Administrators of New Orleans*, 96 U. S. 97, 24 L. E. 616, and *C. N. O. & T. P. R. R. Company v. Kentucky* (Kentucky Railroad Tax Cases) 115 U. S. 321, 29 L. E. 414.

In *Merchants & Manufacturers National Bank v. Pennsylvania*, 167 U. S. 460, 42 L. E. 236, denying the plaintiff's claim that a tax statute deprived it of its property without due process of law because the statute did not provide for personal notice to the property owner, this court decided that a general notice of the time and place of the assessment, provided in the statute, was sufficient notice to the taxpayer, saying:

> "a notice to all property holders of the time and place at which the assessment is to be made is all that due process requires in respect to the matter of notice in tax proceedings."

See also *Davidson v. New Orleans*, 96 U. S. 97, 24 L. E. 616.

Cooley's Constitutional Limitations, Section 486, states this general rule:

> "Having thus indicated the extent of the taxing power, it is necessary to add that certain limitations are essential in all taxation and that it will not necessarily follow, because the power is so vast, that everything which may be done under pretense of its exercise will leave the citizen without redress, even though there be no conflict with express constitutional inhibition. Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will

> prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government. * * * An unlimited power to make any and everything lawful which the legislature might see fit to call taxation would be, when plainly stated, an unlimted power to plunder the citizen."

Continuing discussion of the Delaware Statute, it is further maintained that:

> (d) THE SPECIFICATION OF THE PROPERTY OF TELEGRAPH COMPANIES FOR ARBITRARY VALUATION AMOUNTS TO A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

We shall now consider that clause of the 14th Amendment which guarantees to all citizens the equal protection of the laws and the application thereof to this case. The foregoing argument, under the Due Process Clause, was necessarily predicated upon the proposition that this Delaware statute amounts to a property tax; because a tax may be arbitrarily assessed upon a privilege and no "day in court" need be afforded the tax payer. But this predicate is not necessary to an application of the equal protection clause; for even a tax on a privilege must afford the taxpayer the equal protection of the laws guaranteed by the Federal Constitution to every inhabitant of the state. For example, the state may not charge red-headed lawyers $25 for their license to practice and other lawyers only $10; no more can it tax telegraph companies a

larger amount for the privilege of doing business within its borders than it taxes other corporations, unless there is some inherent justification for the discrimination.

The Delaware Statute specifies that "all telegraph poles and wires overhead" shall have their value assessed at not less than $6600 and not more than $7300; and "all pipes, conduits, wires or other underground construction used as telegraph lines" shall be assessed as worth not less than $4000 and not more than $4400. Certain other classes of property are also subject to this kind of valuation, but their inclusion does not alter the fact that certain limited classes of property are arbitrarily valued by the Delaware Legislature as worth a given amount of money without any reasonable assurance that the property is in fact, worth that much. Telegraph and telephone companies, street railway companies, gas companies and other public utilities must have their property arbitrarily valued by the legislature, but this harsh requirement does not apply to industrial manufacturing concerns such as powder plants, steel mills, paint factories or leather tanneries; nor to railroads or steamship companies. In other words, Delaware property as a whole is valued in accordance with the facts affecting its value, but a limited number of classes of property are singled out and arbitrarily valued without any relation to those facts. Therefore, each of the owners of the property specified for arbitrary valuation is denied the equal protection of the laws.

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 42 L. E. 1037, Mr. Justice McKenna thus stated the difficulty of declaring exactly what constitutes an equal protection of the laws:

> "What satisfies this equality has not been and probably never can be precisely defined. Generally, it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.' * * * It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liability imposed. * * * But what is the test of likeness and unlikeness, of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound and yet they are definite steps to precision and usefulness of definition when connected with the facts of the cases in which they are employed. With this for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the state a wide latitude as far as interference by this court is concerned."

After contrasting the various cases in which particular classifications have been sustained and denied respectively, in an attempt to answer

the question "What test is there of the reasonableness of a classification?" the opinion concludes with this generalization:

> "There is, therefore, no precise application of the rule of reasonableness of the classification and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons and things."

Although mere "differences in the machinery for assessment or equalization do not constitute a denial of the equal protection of the laws" (*Southern Railway Company v. Watts*, 260 U. S. 519), yet equality of taxation does imply equality of assessment, as well as equality of the tax rate, as was said in *County of San Mateo v. Southern Pacific Railroad Company*, 8 Sawyer 238:

> "As the foundation of all just and equal taxation is the assessment of the property taxed, that is, the ascertainment of its value, in order that the tax may be levied according to some ratio to the value, uniformity of taxation necessarily requires uniformity in the mode of assessment, as well as in the rate of taxation; or to quote the language of the Supreme Court of Ohio expressing the same thought:
>
> 'Uniformity in taxing implies equality in the burden of taxation and this equality of burden cannot exist without uniformity in

the mode of assessment, as well as in the rate of taxation'."

In *Sioux City Bridge Company v. Dakota County,* 260 U. S. 441, 67 L. E. ....., it was decided that the intentional valuation of the property of a corporation at a rate higher than that generally used in valuing property for taxation amounted to a denial of the equal protection of the laws guaranteed by the constitution.

In *C. N. O. & T. P. Railroad v. Kentucky* (Kentucky Railroad Tax Cases), 115 U. S. 321, 29 L. E. 414, the state statute required railroads to furnish a list of their property with its valuation and authorized a Board of Commissioners to revise this valuation, if improper. This method of valuation was different from that imposed upon real estate in general and the railroads contended that, because of this classification and distinction, they were denied the equal protection of the laws. This court sustained the right of the legislature to so classify different kinds of property, saying that the different nature and uses of railroad property and of other real estate justified the distinction drawn between the two classes, and as the law applied impartially to all members of each class, it was valid.

In *St. L. & S. F. R. R. v. Mathews,* 165 U. S. 1, 41 L. E. 611, another classification of railroads was sustained because it was reasonable.

In *Gulf C. & S. F. Railroad v. Ellis,* 165 U. S. 150, 41 L. E. 666, the state statute subjected railroads (only) to the payment of an attorney's fee in its unsuccessful litigation. This court

held that this classification of and discrimination against railroads amounted to a denial of the equal protection of the laws, saying:

> "But it is said that it is not within the scope of the 14th Amendment to withhold from states a power of classification and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (cases cited), yet it is equally true that such classification cannot be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must rest upon some defense which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. * * * Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them, which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.
>
> "But arbitrary selection can never be justified by calling it classification. The

> equal protection demanded by the 14th Amendment forbids this."

A case often referred to in a discussion of this subject is *Barbier v. Connolly*, 113 U. S. 27, 28 L. E. 923. There an ordinance, prohibiting the operation of laundries at night in San Francisco, was sustained as a valid police regulation. In considering the Equal Protection Clause, the court said that it was simply intended

> "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike a person similarly situated, is not within the amendment."

This means that a law, classifying certain individuals or their property and applying regulations to the class, is valid if (1) the classification is reasonable (i. e., carries out a public purpose) and (2) the regulations imposed apply equally to all members of the same class. It does not mean that a state can make any sort of a classification of individuals or property and justify it simply because the regulations imposed upon the class apply equally to all mem-

bers within the class. For example, a special tax imposed upon all red-headed lawyers could not be justified simply because all red-heads are treated alike. This is just the fault with this Delaware Statute: because the classification of telegraph companies for the purpose of arbitrarily valuing their property is an unreasonable classification and one which does not carry out any public purpose. Therefore, the mere fact that all corporations doing a telegraph business are treated alike does not save the law.

Another case often referred to is *Yick Wo v. Hopkins,* 118 U. S. 346, 30 L. E. 220, but that case does not seem to have general application, because the discrimination which invalidated the statute was not the discrimination between brick and frame laundry buildings, but between the American and Chinese applicants for licenses; the discrimination between races being without justification. The law was invalid because its regulation was not impartially applied to all within the class created (wooden buildings).

In *Southern Railway v. Greene,* 216 U. S. 400, 54 L. E. 536, a state statute subjecting foreign corporations to a special tax was held to be a denial of the equal protection of the laws, although the tax was applied equally to all such corporations. That is, the classification was illegal, although all members of the class were treated alike. The court said:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and sub-

> stantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Connolly v. Union Sewer Pipe Company, 184 U. S. 540, 46 L. E. 679. A state anti-trust statute, which exempted from its inhibition combinations between agriculturists, was held invalid as a denial of the equal protection of the laws; the opinion citing *Railroad v. Ellis, supra.* The opinion recognizes the right to classify and discriminate in tax matters to a greater extent than in other matters, but this proposition does not impair the force of the case as an authority against the validity of this Delaware Statute now under consideration, because it is clearly said that classification for taxes is valid only "so long as the classification does not invade rights secured by the Constitution of the United States." And this must mean, only so long as the reasonableness of the classification is justified by the facts upon which it rests.

Another case recognizing the necessity for reasonableness sustaining every classification resulting in discrimination in the method in which property is taken by the state is *South Carolina ex rel. Phoenix Mutual Life Insurance Company v. McMasters*, 237 U. S. 63, 59 L. E. 839. There the state authorities had required of one corporation a deposit of securities and accepted from another a mere surety bond as a condition

precedent to the right to operate within the state. This discrimination was held to be justified because of conditions peculiar to the favored corporation, the court saying:

> "It has always been held consistent with this general requirement, to permit the states to classify the subjects of legislation and make differences of regulation, where substantial differences of condition exist."

In *C. N. O. & T. P. Railroad v. Kentucky*, 115 U. S. 321, 29 L. E. 414, the court also sustained the classification and discrimination in the imposition of a tax. The Kentucky statute, although designating the railroad property as real estate, classified such property separate from other forms of real estate and subjected it to the different method of assessment and taxation. The railroad property was taxed upon a mileage valuation basis, whereas other corporations lumped the value of their property as a whole and were taxed on that valuation at the rate applied to the same value of real estate. It was held that this was not a denial of the equal protection of the laws. The court said that there was nothing in the state constitution which required that taxes should be levied in a uniform method upon all forms of property

> "and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied im-

> partially to all of the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the legislature has seen fit to impose."

The reason for this decision seems to be that the different method of taxation applied to railroads as distinct from other forms of real estate and other corporations was justified by the inherent difference between railroad property and other forms of real estate and other forms of corporate property. In short, the special classification in that case was legal because it was reasonable.

A similar case is *American Sugar Refining Company v. Louisiana*, 179 U. S. 88, 45 L. E. 102, where the court sustained a certain discrimination in taxes imposed upon sugar refiners, but recognized the necessity for the reasonableness of any classification in these words:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive or capricious and made to depend upon * * * con-

> siderations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In *Bethlehem Motors Corporation v. Flynt*, 256 U. S. 421, 65 L. E. 1030, the state statute levied a license tax on all corporations manufacturing or selling automobiles in the state, but varying in amount according to whether or not the corporation's assets were invested in property within the state or in state bonds. It was held that this constituted a discrimination against corporations whose plants were outside of the state because it was impracticable for such companies to invest their assets in state bonds.

In *Truax v. Corrigan*, 257 U. S. 312, 66 L. E. 254, the state statute authorized a peaceful boycott of an employer's premises by former employees, but all other boycotts (e. g., by one employer of another employer) remained illegal. This court held that discrimination based upon such a classification was a denial of the equal protection of the laws. The court, by the Chief Justice, said that equal protection does not prohibit legislation, limited either in its objects or field of operation, but does prohibit legislation which by immunity granted to one class, however small, deprives another class, however small, of a personal or property right. And so—we submit—if to grant some immunity to a special class results in a denial of equal protection to all classes not included in the immunity, *a for-*

tiori, is equal protection denied to a class singled out for some special spoliation, as is the case with telegraph companies in this Delaware statute now under consideration.

In the very recent case of *Haavik v. Alaska Packers Association*, decided by this court, 7 January, 1924, the necessity that the classification adopted in a tax statute must be reasonable in order to be valid was again recognized when it was decided that a poll tax levied only upon non-resident fishermen afloat within the territorial waters of Alaska did not amount to a denial of the equal protection of the laws to the non-resident class because it was not unreasonable to exempt the residents of a territory who were otherwise liable to contribute toward the operation of its government.

Jones v. Union Guano Company, decided by this court, 18 February 1924, is another very recent case recognizing the necessity for reasonableness as a justification for discrimination. There a state statute distinguishing actions against the fertilizer companies from other litigation by requiring chemical analysis of the fertilizer involved before action can be brought on the contract was sustained, because

> "We think it plain that actions to recover damages to crops resulting from use of fertilizers may reasonably be distinguished from other damage suits."

See also *Packard v. Banton*, decided the same day, and *Porterfield v. Webb*, decided 12 November, 1923.

Puget Sound Power & Light Company v. King County, another case decided on 18 February, 1924, sustains a discrimination in the method employed by a state to collect taxes on street railway property. A careful reading of the opinion shows it to be simply another decision sustaining a discrimination against a class of property because the classification was a reasonable one. The suit was brought by a corporation to restrain the collection of state taxes on street railway property owned by it. Originally, the real and personal property of a street railway in the State of Washington was assessed separately; but by an act of the legislature it was provided that all of the operating property of such companies should be assessed and taxed as personalty. The practical result of this change was to advance the date for payment of the tax on the company's realty and to raise the rate of interest on delinquent taxes assessed against the realty and to authorize the sale of the property without right of redemption in the case of delinquency in the payment of the taxes assessed against realty.

The company contended that to make such a distinction between the taxes on the real estate of a state railway and other corporations, amounted to a denial of the equal protection of the laws.

The opinion points out that: The act considered the entire property of street railways as a whole and treated it as a complete business unit; there is a manifest difference between the property of a street railway and a steam railway; street

railway property is practically all personalty; and a separate method of taxation on these two classes of property is justified by the difference between the properties themselves.

It was held that a separate method of taxing the real estate of street railways was not arbitrary because it was justified by the inate characteristics of and circumstances surrounding such property. The court said:

> "A street railway is *sui generis*. It is not necessarily to be regarded as real estate. Its value is made of uncertain factors. When its franchise to do business expires, its easement in the streets usually terminates and its rails become but scrap steel. We do not think, considering the very wide discretion the legislature has in such a case, that it was arbitrary to tax the whole street railway unit as personalty."

Then appears this significant sentence

> "That such a change in this case entailed no real hardship or arbitrary discrimination is shown by the fact that before the new method of treating street railway property was enforced, the tax agent of the street railway company, for several years, requested that railroad and personalty be taxed in *solido*."

The opinion points out that "actual equality of taxation is unattainable" and the 14th Amendment was not intended and should not be construed as attempting to enforce any such im-

possible result; quoting from *Bell's Gap R. R. Co. v. Pennsylvania,* 134 U. S. 232, 33 L. E. 892. The opinion concludes with these words

> "Clearly, there is nothing of an unusual character in the method adopted in this case for the assessment and collection of taxes upon street railways. The general practice of providing special methods of estimating the burden of taxation which this peculiar kind of property should bear, is well known and proves that it justifies a separate classification."

So it is seen that this decision is based upon the principle that the special method of taxing street railway property was founded upon and justified by the difference between that kind of property and other property. In other words, the classification was reasonable.

Racide v. New York, decided by this court, 10 March, 1924, is, at this writing, the last authoritive word on this subject. The facts are of no interest, but only this general principle enunciated:

> "Of course, the mere fact of classification is not enough to put a statute beyond the reach of the equality provision of the 14th Amendment. Such classification must not be 'purely arbitrary, oppressive or capricious' * * * Inequality produced in order to encounter the challenge of the constitution must be 'actually and palpably unreasonable and arbitrary'."

In the foregoing decisions, we have examined a fairly broad selection of cases involving discrimination by the state against classifications of property and persons in matters of taxation and otherwise. But it seems impossible to lay down any definite principle in determining what constitutes equal protection of the laws. About the only conclusion which can be drawn is that exact equality of treatment is not required, but any inequality of treatment of and any discrimination against any class of persons or property and the selection of the persons or the property singled out for the peculiar treatment accorded must be justified on some reasonable basis. The basis for the classification must be reasonable in the light of all of the surrounding circumstances. And the criterion of what is and what is not reasonable must be supplied by the individual facts of each individual case.

We submit that there is no reasonable basis for including telegraph companies in a class of corporations whose property is arbitrarily assessed at a minimum and arbitrary valuation fixed by the state. There is no reasonable basis for the classification of corporations whose property is arbitrarily valued at a minimum sum having no relation to its actual value; and, therefore, the corporations within that class have been denied the equal protection of the laws.

In conclusion, we would sum up our argument in these words:

The jurisdiction of this court and its independent discretion to decide for itself the questions involved are clear. This Delaware Statute is,

in name, intent and effect, a tax on the property of the telegraph company. It is unconstitutional because it amounts to taxation by legislative fiat and so deprives the telegraph company of its property without due process of law; and it discriminates against this telegraph company in the arbitrary method of assessing its property, and so denies it the equal protection of the laws.

We, therefore, most earnestly contend that the judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted,

HORACE GREELEY EASTBURN,
Of Wilmington, Delaware,

OVERTON HARRIS,
Of New York City,
Counsel for Plaintiff in Error,
New York, Philadelphia & Norfolk Telegraph Company.

OVERTON HARRIS,
Of Counsel.

CASES

Chapter 205

An Act to Alter and Re-establish the Statutes Relating to the City of Wilmington.

Be it enacted by the Senate and House of Representatives of the State of Delaware in General Assembly met (two-thirds of all the members elected to each House thereof concurring herein):

Section 1. That Section 80, Chapter 207, Volume 17, Laws of Delaware, be and the same is hereby amended by inserting in said Section 80, between the word "companies" in the tenth line of said Section, and the word "Every" in the eighteenth line of said Section, the following, viz.:

"All street railway lines, all gas mains, all electric light poles and wires, all telephone or telegraph poles and wires, all poles and wires used in transmitting heat, light or power, all pipes, conduits, wires or other underground construction, used as electric light, telephone or telegraph lines, or in transmitting electric light, heat or power, and all pipes or conduits used in carrying water, located on the public streets in the City of Wilmington or on private property not otherwise taxed, excepting those now ex-

empted from taxation by law, shall be assessed in the following manner:

(a) All street railways shall be assessed per mile for each mile or fraction thereof of single track within the City of Wilmington, but such assessment shall not be less than eighteen thousand dollars and not more than twenty thousand dollars per mile.

(b) All gas mains in actual use, located in the streets of the City of Wilmington shall be assessed per mile or fraction thereof, for each mile of the streets used, but such assessment shall not be less than four thousand dollars and not more than four thousand five hundred dollars per mile.

(c) All electric light, telephone or telegraph poles and wires overhead, used as electric light, telephone or telegraph lines, located in the streets of the City of Wilmington shall be assessed per mile or fraction thereof, for each mile of the streets used, but such assessment shall not be less than six thousand six hundred dollars and not more than seven thousand three hundred dollars per mile.

(d) All poles, wires, or other overhead construction, used in transmitting heat, light or power, located in the streets of the City of Wilmington, shall be assessed per mile or fraction thereof for each mile of the streets used, but such assessment shall not be less than four thousand dollars and not more than four thousand four hundred dollars per mile.

(e) All telephone, telegraph or electric light underground conduits, or wires, pipes, conduits or other underground construction used in transmitting heat, light or power, located in the streets of the City of Wilmington, shall be assessed per mile or fraction thereof, for each mile of the streets of the city used, but such assessment shall not be less than four thousand dollars and not more than four thousand four hundred dollars per mile.

(f) All underground pipes or conduits used in carrying water, located in the streets of the City of Wilmington, shall be assessed per mile or fraction thereof, for each mile of the streets of the city used, but such assessment shall not be less than four thousand dollars and not more than four thousand four hundred dollars per mile.

Any light company which uses the same system or materials for furnishing heat, light and power shall not be doubly assessed on the same construction.

The assessment shall not be made against both the owner and the operators of the street railways, gas mains, electric light, heat, light and power, telephone or telegraph lines and water pipes mentioned in this section.

Every person, firm, association or corporation owning or operating any street railway, gas mains, electric light, heat and power, telephone or telegraph lines, and water pipes in the City of Wilmington, mentioned in this section, shall on or before the first day of April of each and

every year, file with the Clerk of the Council of the said City of Wilmington a sworn statement which shall set out the following:

(1) In the case of every such person, firm, association or corporation owning or operating any street railway, setting forth the total mileage of single tracks of every such company within the limits of the City of Wilmington.

(2) In the case of every such person, firm, association or corporation owning or operating any telegraph, telephone, gas, water, electric light, or heat and power business, system, or plant, shall state the total number of miles of the streets of the City of Wilmington used by every such person, firm, association or corporation, overhead and underground, in its said business.

(3) In case of an individual, firm or association transacting any such business, said statement shall be verified by the oath or affirmation of any one of the persons, owning or operating the same; and in the case of every corporation owning or operating any such business, said statement shall be verified by the oath or affirmation of the Treasurer of every such corporation. Said taxes shall be due and payable to the Mayor and Council of Wilmington annually at the same time that the city and school taxes due said city are payable, and shall be subject to the same rebates, deductions, discounts, allowances and penalties as are now or hereafter may be provided by law in reference to such city and school taxes.

The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so *pro rata*. All assessments upon real estate shall be so made as to show separately the valuation of the improvements upon and the total valuation of the property assessed, and such property shall be described with such particularity as will enable it to be clearly identified, and the name of the owner, or last owner or reputed owner shall be given, if known. Such name shall be regarded as an aid to identify such property, but a mistake in the name of the owner, last known owner or reputed owner, or the absence of name, shall not effect the validity of the assessment or any tax based thereon.

The Board of Assessment, Revision and Appeals shall make or cause to be made, so soon as practicable, maps of all the real estate in the city, to be known as tax maps, and such other records as may be necessary, which shall be used as the basis of assessment of real estate. Said maps and records shall, so far as possible, show all things necessary to enable adequate assessments to be made.

The Board of Assessment, Revision and Appeals may engage the services of experts and such other employees as it may deem necessary to carry into effect the provisions of this section, and shall fix their duties, compensation and terms of service. All necessary expenses of the said Board of Assessment, Revision and Appeals shall be paid by the Council upon bills presented

to it, marked with the approval of the said Board and properly audited by the City Auditor in the same manner as other bills against said City of Wilmington are now passed.

To better enable said Board of Assessment, Revision and Appeals, and the Assessors and Collectors to make said assessments they shall have the right to examine all records in the county office, kept at the Court House in the City of Wilmington in and for New Castle County, free of all costs and charges.

Section 2. That the Board of Assessment, Revision and Appeals for the City of Wilmington, shall be and they are hereby authorized to make the first assessment on street railway lines, gas mains, electric light poles and wires, poles and wires used in transmitting heat, light or power, pipes, conduits and other underground construction, used as electric light, telephone or telegraph lines or in transmitting electric light, heat or power, and all pipes or conduits used in carrying water, as provided for in this Act at any time prior to the thirty-first day of May, A. D. 1913, for the next fiscal year, previous notice of such intended assessment, designating the time at which the same will be made, being given by the board in writing to the owner, owners, operator or operators of said property.

Section 3. That Section 16 of Chapter 177, Volume 24, Laws of Delaware, approved March 25, A. D. 1907, in so far as it is inconsistent herewith, as well as other Acts or parts of Acts inconsistent herewith, are hereby repealed.

Approved April 7, A. D. 1913.

Supreme Court of the United States

October Term, 1923—No. 972 (New No. 275)

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

—vs.—

JOHN I. DOLAN, Collector of Taxes for the Southern District of the
of Wilmington,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE

SUPPLEMENTAL BRIEF FOR PLAINTIFF-IN-ERROR

HORACE GREELEY EASTBURN,
OVERTON HARRIS,
Counsel for Plaintiff-in-Error.

OVERTON HARRIS,
Of Counsel.

BYRON AND BRIGGS, INC., PRINTERS, NEW YORK

SUPREME COURT OF THE UNITED STATES

October Term, 1922—No. 972 (New No. 275)

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY, Plaintiff-in-Error,

—versus—

JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington.

In Error to the Supreme Court of the State of Delaware.

SUPPLEMENTAL BRIEF FOR PLAINTIFF-IN-ERROR

Doubtless every plaintiff-in-error, after oral argument, feels that he failed to present the issues to the court clearly; and this is particularly true in this case.

The points of law involved are

(1) This court is not bound by the decision of the State Court that the Delaware statute is a privilege tax; but this court should determine that question for itself, because whether the statute be a property tax or a privilege tax controls the validity of the statute under the 14th Amendment.

(2) The tax provided by the statute is a property tax and, as such, taxes the property of this telegraph company without due process of law. The factor in due process which is lacking is the opportunity to be heard on the question of the minimum value of our property; and the property taken is the amount of the tax itself, for which judgment has gone against us in the State Court. The validity of the tax, under the Due Process Clause, is not dependent upon whether or not the particular property involved in this case was overvalued or undervalued; the validity of the statute depends, not upon what *has* been done under it, but what *might* be done under it. The imposition of an arbitrary valuation on property is a denial of due process and the tax imposed upon such an illegal valuation is a taking of property to the extent of the tax itself.

Whether or not the Delaware Legislature intended to reach the company's license with this tax, the tax is in fact imposed on the company's property and must be tested by property tax rules. This tax is distinguished from privilege taxes which are merely measured by the corporate property as a going concern, because in none of those cases did the State go so far as to fix an arbitrary value on the property. When a privilege tax is calculated on property, the constitutionality of the method of calculation must be determined by property tax rules; one of which is that the taxpayer must be heard upon the question of value. For example: a tax on a lawyer's license to practice, measured by an arbitrary value fixed by the state upon his office furniture,

would be unconstitutional, under the Due Process Clause.

(3) But even if the tax be a privilege tax, it yet denies us the equal protection of the laws; because it unreasonably discriminates against telegraph companies by fixing a minimum value on their property and not on property generally.

(4) As this record is before the court on a Federal question, questions of state law are also subject to review. Article 8, Section 1 of the Delaware Constitution provides:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, but the General Assembly may by general laws, exempt from taxation such property as in the opinion of the General Assembly will best promote the public welfare."

It cannot be said that this Delaware tax statute is a uniform law or a general law; because it is limited in application to telegraph companies and a few other corporations. See *Greene v. Louisville & Interurban R. R. Company*, 244 U. S.; 499, 61 L. E.; 1280.

The city's declaration simply alleges the telegraph company's ownership of 3 1/2 miles of poles and wires in the streets and the assessed valuation thereof and the taxation thereon, at a certain rate and finally the amount of the tax thus calculated. The company filed a general demurrer to this declaration attacking the sufficiency thereof under both the State and the Federal

Constitutions. The trial court overruled the demurrer whereupon the telegraph company appealed to the Supreme Court of Delaware, assigning as error the insufficiency of the statute under both the State and Federal Constitutions. The Supreme Court of the State affirmed the trial court.

The assignment of errors in this court specifically relies upon the Due Process and Equal Protection Clauses of the Federal Constitution and then generally assigns as error (1) the overruling of the demurrer, (2) the affirmance of the judgment of the trial court and (3) the decision that the company is liable for the taxes. These assignments, although general in terms, relate back to the specific assignment of error which brought specifically before the Supreme Court of Delaware the insufficiency of the statute under the State Constitution; and so that state question is now before this court.

This is a "plain error" within the meaning of Rules 21 and 25.

Strange to say there has been no decision of the Supreme Court of Delaware under this provision of the State Constitution, which is germane to the point now raised. The question is one of novel impression in the state jurisprudence. This statute should be held to violate the State Constitution as in *Greene v. Louisville, etc., R. R., supra.*

The argument on the facts contained in our original brief may properly be amplified by the following remarks concerning property and privilege taxes in Delaware.

In an act, providing for the valuation of real

and personal property within the state, and an Act Concerning the Levy Court * * * Assessors, Collectors, etc., appearing in Volumes 1 and 2, Laws of Delaware, and republished in the codes of 1829, 1852, 1876 and 1893 respectively, appear the entire machinery for the assessment and collection of property taxes throughout the State of Delaware for the last 200 years. In those volumes is found the entire system of Delaware tax legislation, and it is against that background that the 1913 Amendment to the Wilmington Charter should be viewed.

Those early statutes provide in substance that all real and personal property within the state shall be assessed and the assessments returned to the levy court to which appeals may be taken by the taxpayers. In recent years, assessors have been abolished and in their stead have been created Boards of Assessment, Revision and Appeals which make the assessments, hear appeals therefrom and revise the taxes in their discretion.

An examination of those early statutes shows that, for more than 100 years, in Delaware the only method of property taxation has always embodied the very provisions contained in the Wilmington Charter before Section 80 was amended in 1913; those provisions being (1) assessment of the value of property, (2) a tax applied to the assessed value "according to a certain rate in and upon every $100 of the assessment" and (3) the right of appeal from the assessment. From the earliest period of the State's history to this date, the only real difference between the 1913 Amendment to Sec-

tion 80 of the city charter and the State's general property tax laws consists in this: that the 1913 Act taxes telegraph poles and wires by imposing an arbitrary minimum value upon the property, whereas the general property tax acts assess property such as houses, lands and personal property "at their true value in money" and afford the property owners the right of appeal from the assessment.

The Delaware Tax Laws have also always provided for privilege taxes. But they are clearly distinguishable from property tax statutes in that the privilege taxes are always imposed in specific sums, rather than in indefinite sums determined by a tax rate imposed upon an assessed valuation. An example of such a privilege tax statute is found in Volume 18, Laws of Delaware, page 561. This statute, entitled "An Act taxing Telegraph Companies doing business in this State" is now in force and imposes a state franchise tax on telegraph companies. This is a representative privilege tax statute and the difference between its terms and that of the 1913 Amendment to Section 80 of the City Charter is readily apparent.

> "SECTION 1. That every * * * corporation owing * * * any line or lines of telegraph * * * within this State, shall be subject to taxation for the use of the State in the following manner, viz: Each such * * * corporation shall annually * * * pay to the State Treasurer for the use of the State, a tax of sixty (60) cents per mile, for the longest wire within the State; a tax of thirty (30) cents per

mile for the next longest wire, and twenty (20) cents per mile for each and every other wire owned, maintained and operated within the state."

The striking fact which stands forth from a consideration of the two kinds of tax statutes in Delaware is this: That whenever a statute has imposed a tax on property, it has provided that the value of the property shall be ascertained by appraisment and the tax shall be calculated at a certain rate on every hundred dollars of the assessed valuation; but where the tax has been imposed on a privilege, the statute has imposed a specific amount of tax and this is directed against the persons, owners or occupiers of the property. That is, a privilege tax is always in a specific sum and is levied on the persons owning or occupying the property and not the property itself. The 1907 Amendment to Section 80 of the City Charter is thus levied on the persons operating the property and the tax is in a specific amount; whereas the 1913 Amendment is levied upon the property itself and in an indefinite amount to be determined by the application of a given tax rate to an arbitrary valuation.

The deadly parallel is a ready means of contrasting the Acts of 1907 and 1913 and showing the glaring difference between the two.

ACT 1907	ACT 1913
First Paragraph. [Objects Taxed & Amount of Tax.]	Corresponding Paragraph. [Objects taxed–Amount not Determined.]
The Mayor and Council of Wilmington is hereby given express authority to collect and receive annually "from *telegraph,* telephone * * * companies * * *."	"All * * * *telegraph poles and wires* located on the public streets in the City of Wilmington or on private property not otherwise taxed * * * shall be *assessed* in the following manner," and taxed on that assessment.
(a) From all persons, firms, associations, or corporations owning or operating any street railway * * * $200 per mile.	(a) "All street railways shall be assessed per mile" * * * and taxed on that assessment.
(b) From all persons, firms, associations or corporations owning or operating any gas company * * * $60 per mile.	(b) "All gas mains * * * shall be assessed per mile" * * * and taxed on that assessment.
(c) From all persons, firms, associations or corporations owning or operating any electric light company * * * $100 per mile.	(c) "All electric light, telephone or telegraph poles and wires overhead * * * located in the streets of the City of Wilmington shall be assessed per mile" and taxed on that assessment.
(d) From all persons, firms, associations or	(d) All heat, light and power poles, wires,

corporations owning or operating * * * telegraph company business within the limits of the City of Wilmington * * * $100 per mile overhead.

(e) From all persons, firms, associations or corporations owning or operating any telegraph or telephone lines underground * * * $60 per mile.

(f) From all persons, firms, associations or corporations owning or operating heat, light or power companies overhead, $60 per mile.

(g) From all persons, firms, associations or corporations owning or operating water mains underground, $60 per mile.

After said Paragraphs, said Act of 1907 provides:

Paragraph 3, Act of 1907:

"The taxes provided for by this amendment shall be in lieu of and instead of all other taxes, license and revenue imposed, required or derived from any

&c. "shall be assessed per mile" and taxed on that assessment.

(e) "All telephone, telegraph or electric light, underground conduits or wires, &c., shall be assessed per mile" and taxed on that assessment.

(f) All underground water pipes or conduits * * * located in the streets of the City of Wilmington "shall be assessed per mile" and taxed on that assessment.

After said Paragraphs, said Act of 1913 provides:

"Any light company which uses the same system or materials for furnishing heat, light and power *shall not be doubly assessed on the same construction.*"

conduits, pipes, mains, ducts, wires, roadbeds, t r a c k s, ties, poles, cables, lamps, lights, and all other equipments, materials and apparatus belonging to any such persons, firms, associations or corporations, in, or placed in, on or over the streets of the City of Wilmington."

The last provision in the Act of 1913 above quoted, providing against double taxation, is a clear indication that the tax is upon the property and not upon the privilege of using that property. It shows that the electric light poles and wires are taxed, rather than the privilege of using them, because it is provided that the same poles and wires shall not be taxed twice if used by different persons. Moreover, it should be noted that in the Amendment of 1913 the tax is to be assessed and collected by assessors and collectors, although under the general taxation system of Delaware neither assessors nor collectors have anything to do with privilege taxes, but are concerned only with property taxes.

We submit that if it is decided that the tax provided in the Act of 1913 is a tax on privilege, rather than upon property, this will recognize a clear departure from the usual form of privilege tax adopted in Delaware since the Colonial origin of that state; and it will, for the first time, present a privilege tax levied not upon persons or businesses, but upon property; and

not in a specific amount, but in an indefinite amount which is calculated by applying a tax rate to an assessed valuation.

For the foregoing reasons and the reasons contained in our original brief, we earnestly contend that the judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted,

HORACE GREELEY EASTBURN,
OVERTON HARRIS,
Counsel for Plaintiff-in-Error.

(7262)

HIGGINS AND HIGGINS, INC., PRINTERS, NEW YORK

IN THE

Supreme Court of the United States.

No. 275 October Term, 1922.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

v.

JOHN I. DOLAN, Collector of Taxes for the Southern District of the City of Wilmington.

In Error to the Supreme Court of the State of Delaware.

Brief for Defendant-in-Error.

CALEB S. LAYTON,
JAMES R. MORFORD,
Counsel for the Defendant-in-Error.

CONTENTS.

CASES.

CASES—Continued.

IN THE

Supreme Court of the United States.

October Term, 1922. No. 972.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY,
Plaintiff-in-Error,

v.

JOHN I. DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

BRIEF FOR DEFENDANT-IN-ERROR.

I.

STATEMENT.

The statement of facts contained in the brief for the plaintiff-in-error is substantially correct respecting the facts and history of the litigation. There are several matters throughout the brief of the plaintiff-in-error which make it necessary to direct the Court's attention to the exact facts shown in the record. The cause arose on an action of debt and the essential elements of the declaration are that the defendant-in-error is one of the tax collectors for the Mayor and Council of Wilmington, a municipal corporation of the State of Delaware; that the plaintiff-in-error is a corporation of the State of Delaware and at the times mentioned was using poles and wires in streets of the city of Wilmington, Delaware, in its business as a telegraph company; that by virtue of Section 80, Chapter

207, Volume 17, Laws of Delaware, as amended, by Section 1, Chapter 205, Volume 27, Laws of Delaware, the proper officials of the city of Wilmington assessed at the rate of seventy-three hundred dollars per mile, the three and one-half miles of poles and wires owned, operated and used by the plaintiff-in-error in its business as a telegraph company in the streets of the said city of Wilmington; that in accordance with law the tax rate was duly determined and that taxes for the years 1913 to 1918, inclusive, were thereupon assessed, which taxes by reason of the nonpayment thereof became subject to certain penalties set forth in the record (p. 11); and which tax and penalties the plaintiff-in-error refused to pay. This declaration was demurred to. The demurrer was overruled and final judgment was taken thereupon and the case taken to the Supreme Court of Delaware upon the facts disclosed in the declaration and admitted by the demurrer.

There is nothing in the record to show in any manner whatsoever that the plaintiff-in-error was at the time the above-mentioned taxes were levied and assessed, engaged in the business of interstate commerce. This statement becomes necessary by reason of the fact that there appears in the petition for the writ of error, in the second paragraph thereof (Record, p. 1) a statement to the effect that the plaintiff-in-error was during the time above mentioned engaged in the business of transmitting intelligence by wire between various points in the United States, both within and without the State of Delaware to various other points within the United States, both within and without the State of Delaware. So far as a careful examination of the record reveals, there is nothing in the record of the proceedings originally instituted in the Superior Court of the State of Delaware, in and for New Castle County, which will justify this statement.

It further appears from the declaration aforesaid (Record, pp. 9-11) that there is nothing that indicates in any manner whatsoever that the plaintiff-in-error was entitled to any of the rights, privileges or benefits which a telegraph company may acquire under the Act of Congress of July 24, 1866, 14 Statutes at Large 221, Revised Statutes, Section 5263 *et seq.* and the amendments thereof known as the Post Road Act. A statement of this fact becomes necessary by reason of the fact that throughout a certain portion of the brief of the plaintiff-in-error authorities are cited and the argument assumes that for the purposes of this case the plaintiff-in-error is entitled to the benefits accruing to it under said act.

It further becomes necessary to call attention to the fact that no testimony was taken in the cause and there is no evidence in the record to show whether or not the amount of the tax levied and assessed is confiscatory. This statement becomes necessary because authorities are cited throughout the brief of the plaintiff-in-error and it is apparently urged that the amount of the tax is so large as to deprive the plaintiff-in-error of its property without due process of law.

II.

LAW.

Interpretation of the Statute.

The original act to which the statute under consideration is an amendment constituted substantially a revised charter for the city of Wilmington. This act was Chapter 207, Volume 17, Laws of Delaware and its title was: "An Act to Revise and Consolidate the Statutes Relating to the City of Wilmington."

Section 80 of this statute related to the assessment of real estate within the city and did not assume to tax anything other than real estate. The power of the city of Wilmington to tax telegraph companies was contained in Section 100 of Chapter 207, Volume 17, which authorized the Mayor and Council to levy and collect taxes upon telegraph poles and other erections of like character erected within the city of Wilmington and granted the Council power by ordinance to prescribe the mode of levying and collecting the same. This statute further provided that if the taxes should not be paid, the Council should have power to cause the same to be removed and might institute suit to recover the amount of taxes levied. The first departure from this statute was contained in Section 16, Chapter 177, Volume 24, Laws of Delaware, approved March 25, 1907, wherein provision was made for the taxation of telegraph companies by an amendment to Section 80 aforesaid, which as we have seen originally applied only to real estate. This amendment (Section 16, Chapter 177, Volume 24) authorized the laying of taxes upon various companies, such as street railway, gas, electric light, telephone or telegraph companies. These companies were required to pay certain designated sums per mile for each mile of the streets of the city of Wilmington used by such companies for their wires, poles, mains, etc. The said statute provided for a smaller tax per mile in the case of underground conduits for telegraph companies than it did for overhead wires. The amendment of 1907 was clearly a license tax for the use and occupation of the streets. The amendment above mentioned continued in force until the Act of April 7, 1913, being Chapter 205, Volume 27, Laws of Delaware, which act required the insertion after the word "Companies" in the tenth line of Section 80 of

the original statute (Chapter 207, Volume 17, Laws of Delaware) the provisions of the amendatory act.

The Supreme Court of Delaware determined that the amendnent of 1913 (Chapter 205, Volume 27) was in substitution for the amendment of 1907 (Chapter 177, Volume 24) and the decision of the Supreme Court of Delaware having relation solely to the effect of the Act of 1913 upon the Act of 1907 is conclusive and not subject to review by this court. The plaintiff-in-error and the defendant-in-error are agreed upon this point.

It therefore appears that since the Act of 1907 there has been embodied in original Section 80 (Chapter 207, Volume 17), which as we have seen originally related only to taxation on real estate, provisions for the taxation of telegraph companies, which apparently have no relation to the subject matter of the original section. No complaint was made by the plaintiff-in-error to the tax assessed under Section 16, Chapter 177, Volume 24, the 1907 Act, notwithstanding this tax provision was introduced into a section dealing originally only with real estate taxation. Complaint is made, however, by the plaintiff-in-error to the present amendment (Chapter 205, Volume 27) on the ground that tax there imposed is a tax upon property and is invalid because no notice or hearing was afforded it. We contend that the whole background of the present statute necessarily leads to the conclusion that the purpose and intent of the statute is merely to change the method of ascertaining the amount of tax which the telegraph company should be required to pay for its occupancy of the streets of the city of Wilmington.

In this connection it is submitted that Section 100 of the original act (Chapter 207, Volume 17) is still in force and unless it should appear that the plaintiff-in-error is entitled to the privileges of the Federal Post Road Act, which does not appear in this case, the city

would be empowered to cause the removal of the poles, since this provision respecting removal appears not to be inconsistent with the later amendments to Section 80.

It becomes necessary to ascertain from the internal evidence contained in this statute as well as the history thereof the proper interpretation which should be given thereto. It appears first that the tax is levied not upon any quantum of property, since it is the mileage of streets occupied by the plaintiff-in-error which is the basis of the assessment. The plaintiff-in-error might have as many wires, poles, conduits or other necessary and proper facilities in connection with its system as it might deem fit and necessary, but whether it has one wire or one thousand wires makes no difference respecting the basis of the tax.

It further appears from the statute under construction that the company subject to tax is required on the first day of April in each year to file with the clerk of Council of the city of Wilmington the sworn statement setting forth the total number of miles of the streets of the city of Wilmington used by such corporation in its business. No requirement is made that this statement shall contain the number of wires, poles, conduits or other facilities or accessories, nor the value thereof. It is upon the statement so furnished by the company that the assessment is determined by the board of assessment, revision and appeals.

It further appears that the statute provides that in case of telegraph companies using underground conduits, the basis of ascertaining the tax shall be considerably less than in the case where overhead wires are used. This is a clear indication that the value of the property was not to be the test in ascertaining the tax, but that the tax was laid for the privilege of using the streets; the use of the streets by underground con-

duits would be less burdensome to traffic thereon and require less cost of supervision and inspection, and in consequence thereof a smaller base is fixed. We believe it would be admitted without contention that the cost of installing underground conduits for telegraph wires would be very much in excess of the cost of placing poles and stringing wires thereon and that from all considerations affecting value, the value to be attributed to underground conduits for telegraph wires would necessarily be far in excess for taxation purposes of such value for overhead wires. This consideration is an internal circumstance which leads strongly to the conclusion that the tax is not placed upon value.

It further appears from Section 1, Chapter 205, Volume 27, Laws of Delaware:

> "The assessment of real estate shall be made according to a certain rate in and upon every hundred dollars of the estimated value of the property assessed, if sold for cash, and so *pro rata*. All assessments upon real estate shall be so made as to show separately the valuation of the improvements upon and the total valuation of the property assessed, and such property shall be described with such particularity as will enable it to be clearly identified, and the name of the owner, or last owner or reputed owner shall be given, if known."

The section further provides that the board of assessment, revision and appeals shall cause tax maps and other records to be made.

The above-mentioned provision of the statute under construction, wherein a telegraph company is required to file a sworn statement showing the total mileage of streets of the city of Wilmington used by it in its business, seems to provide a means of determining the amount of the tax which is wholly inconsistent with the idea that it is a real estate tax and likewise wholly

inconsistent with the methods designated and required for the ascertainment of the assessment upon real estate. Certainly no one could contend that the property of a telegraph company could be sold for taxes but the provisions relating to assessment of real estate require the assessment to be made upon a value at which the property could be sold for cash. Furthermore, in the return filed by the telegraph company, no improvements are required to be stated, as they are required to be separately stated in the case of a real estate assessment; and the act further requires in the case of a real estate assessment that it shall be made so as to show separately the valuation of the improvements and the total valuation of the property assessed. In view of these considerations to be gathered from the contents of the statute itself, it would seem very clear that no matter how informal the statute may be, is clear and proper construction is that the tax upon the telegraph company is a license tax or an occupation tax for the privilege of using the streets of the city.

It may be urged that the minimum of $6600 per mile and the maximum of $7300 per mile indicates that the tax is a property tax. The answer to such contention is that evidently the legislature having empowered the board of assessment to revise the taxation of property and change from time to time the assessments thereof, deemed it wise to permit the board of assessment at the same time to alter the amount to be paid by the telegraph company. It would seem only logical and fair that if real estate values facing upon a certain street have risen in value so that the board of assessment would deem it proper to raise the assessment upon property owners, that the telegraph company occupying the streets upon which the property of individuals might face should likewise be held to the payment of a larger tax, on the theory that the

right to occupy the streets was of more value to them under such circumstances. Furthermore the maximum and minimum limits permitted to the board of assessment under the statute are also justifiable upon the theory that a telegraph company should be required to pay a greater license tax for occupying streets in a congested section of a city than it would be required to pay for occupying streets in the outlying districts of a city. Our contention is that the legislature has fixed the tax in this statute and the plaintiff-in-error cannot complain if the legislature as a matter of grace has recognized that under the circumstances last mentioned the telegraph company should in fairness not be held to the payment of the same tax in an outlying district that it would be properly required to pay in a thickly populated or congested district. There can be little doubt that if the legislature had fixed the base for the determination of the amount to be paid by the plaintiff-in-error at $7300 per mile and had left no discretion in the board of assessment by which they might be permitted to reduce that valuation for the purpose of ascertaining the tax, that this would be clearly a privilege tax specified and determined by the legislature and cannot be subject to any constitutional objection under the facts present in this case.

The summary of our contention is that under a proper interpretation of the statute, the plaintiff-in-error is required to pay a license tax or a privilege tax for the right to occupy the streets of the city. Furthermore, the plaintiff-in-error being a corporation of the State of Delaware and it not appearing that it is engaged in interstate commerce, or is entitled to any of the privileges under the Federal Post Road Act, the tax can also be sustained as a franchise tax upon the right of the corporation to conduct its business in the city of Wilmington.

A Municipal Tax Imposed Upon the Right to Occupy the Streets of the City is Valid.

Special attention is called to the fact that the statute under construction imposes the tax upon the telegraph poles and wires used as telegraph lines located in the streets of the city of Wilmington on a basis of so much per mile or fraction thereof, instead of imposing the tax at so much per pole as is done in many of the cases herein cited. The tax is imposed upon the poles in the aggregate located on each mile of the city streets.

In view of the fact that neither interstate commerce nor the Federal Post Road Act relating to telegraph companies is involved in this cause, it would seem to require no citation of authority for the proposition that the legislature of a state is fully empowered to grant to a municipality thereof the right to lay a tax upon the privilege of using the streets of the city for the purpose of conducting a business thereon, or for the purpose of occupying the streets of the city with its poles and wires. Of course such tax must not be confiscatory but as above shown that question is not involved in this case. In cases wherein the interstate commerce clause and the Federal Post Road Act have been involved, the Supreme Court has nevertheless held such taxations valid.

In City of St. Louis v. Western Union Telegraph Company, 148 U. S. 92, 37 L. Ed. 380, a charge imposed by the city of St. Louis upon the telegraph company for the privilege of using its streets measured by the amount of such use was held to be valid as an occupation tax in the nature of a rental. This case was followed and approved in the case of Postal Telegraph Cable Co. v. Baltimore, 156 U. S. 210, 39 L. Ed. 399.

In Mackay Telegraph & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. Ed. 863, the Court said:

> "These cases establish that a City (supposing, of course, it acts under the authority of the State) may impose such taxes not merely with respect to the special and exclusive occupancy of streets and other public places by poles and other equipment, but by way of compensation for the special cost of supervising and regulating the poles, wires and other fixtures and of using the necessary permits."

In Postal Telegraph Cable Company v. Richmond, 249 U. S. 252, 63 L. Ed. 590, an annual license tax for the privilege of doing business within the city limits by a telegraph company, not including interstate business and Government service, may by authority of the state be imposed by a municipality where such tax does not burden interstate commerce. As previously pointed out no question of interference with interstate commerce is involved in this case. In the case above cited the license tax was in the sum of three hundred dollars "for the privilege of doing business within the City of Richmond" excluding therefrom business done without the state and also business done for the Government of the United States, its officers and agents and in addition an annual fee of two dollars per pole was imposed for each telegraph pole which the company maintained or used in the streets of the city. The Court said:

> "Such tax is . . . an exercise of the police power of the State for revenue purposes restricted to internal commerce and therefore within the taxing power of the State."

See also:

Williams v. Talladega, 226 U. S. 404, 57 L. Ed. 275;

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 38 L. Ed. 871.

No Notice or Hearing Was Required to be Given to the Plaintiff-in-Error in This Case.

McGehee, Due Process of Law, pages 235, 236, says:

> "The right to notice and a hearing does not exist as to any matter which the legislature rightfully determines in providing for the tax. We have seen that the right to select the subjects and the method of taxation is inherent in and inseparable from the taxing power. The selection of the subjects of taxation, especially where the tax is a local one or a special assessment in return for benefits, may involve an adjudication that particular property is liable to the tax, and the selection of a particular method of taxation, for instance, a specific instead of an *ad valorem* tax, may involve an adjudication as to the amount due from the individual taxpayer. The choice of a specific tax by the legislature does not, however, deprive the individual taxpayer of due process of law, for so far as the determination of a question of fact is incidentally involved in the course adopted, that determination is a necessary consequence of the exercise of the taxing power."

Where the legislature fixes the tax or the standard of measurement no notice is necessary, the result being merely a mathematical conclusion.

> English v. Wilmington, 2 Marvel (Del.) 63, 37 Atl. 158.

In Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569, the Court said:

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or

persons or occupations. In such cases the Legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."

Voluminous citations to this proposition might be listed but we conceive that this is not necessary since the point is too sell settled. For further authorities we refer to the annotation to the case of State of Nebraska v. Several Parcels of Land, Lawyers Reports Annotated 1916E, at page 5.

Judson on Taxation, Section 341, says:

> "The Statute does not deny to the plaintiff-in-error the equal protection of the laws under the Fourteenth Amendment to the Federal Constitution."

Cooley on Taxation, Volume 1, Third Edition, page 75 uses the following language:

> "The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation but it does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate.
>
> "Nor does it preclude the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another to a different rate—distinguishing between franchises, licenses and privileges, and visible and tanglible property, and between real and personal property."

In discussing special methods of assessment, Judson on Taxation, Section 509, states as follows:

> "The law-making power determines all questions of discretion or policy in ordering, assessing and collecting taxes, and determining the necessary rules and regulations. The mere fact that a special procedure is provided for the taxation of a certain class of property, different from that provided for another class or from the general procedure in taxation, will not make the act providing such special procedure invalid. These are matters of detail, within the legislative discretion.
>
> "The power to classify property for taxation on any reasonable basis includes also the power to provide special methods of assessment for the different classes. Thus a statute of a State assessing railroad property, which requires the company to return the length of the road within and without the State, values the property within as an entirety, and distributes to each county and city along the line its mileage proportion, is valid. The court said that there was no merit in the objection that the defendants were denied the equal protection of the laws. The Constitution does not forbid the classification of property for the pur-

poses of taxation and the valuation of different classes by different methods. The fact that the legislature had chosen to call a railroad, for the purposes of taxation, real estate, did not identify it with farming lands and town lots in such a sense, as to require the employment of the same methods and machinery of the law to ascertain the value for taxation."

Judson, 503, further says:

"The right to specialize and classify for taxation must be exercised subject to the restrictions in the State constitution, which in many cases requires all property to be taxed according to a uniform rate, and thus precludes the subjection of any property to a different rate. Under such constitutional restrictions it may become important to determine whether a tax is levied as a property tax or as a license tax upon the business conducted or privilege exercised. If a property tax, it must be levied, under the rule of uniformity, according to the rate limited by the constitution; while, if a business or privilege tax, it is not subject to such requirement, though it must be uniform upon all of the same class of subjects. The equal protection of the laws guaranteed by the Federal constitution has of course no relation to such specific restrictions in State constitutions. It recognizes the right to specify and classify whether in property or business taxation, and only requires that the classification be on a reasonable basis and that the tax be uniform and equal as to all of the same class."

In Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. Ed. 237, it was held that the difference between bituminous and anthracite coal form a just basis for their different classification under tax laws. The Court quoted from the case of Watson v. State Comptroller, 254 U. S. 122, 65 Lawyers Edition 170:

"Any classification is permissible which has a reasonable relation to some permitted end of

> Governmental action. . . . It is enough for instance if the classification is reasonably founded in the purposes and policy of taxation."

In Oliver Iron Mining Company v. Lord, 262 U. S. 172, 67 L. Ed. 929, the tax upon the business of mining ore was held to be valid although no smaller tax was imposed upon mine owners doing development work without removing ore. The Court said:

> "Consistently with both provisions the legislature of the state may exercise a wide discretion in selecting the subjects of taxation, particularly as respects occupation taxes. It may select those who are engaged in one class of business and exclude others, if all similarly situated are brought within the class and all members of the class are dealt with according to uniform rules."

There can be no doubt that all parties similarly situated are treated equally under the statute in question. Not only are telegraph companies included but also electric light and telegraph companies are included within the same classification.

It is submitted that the difference existing between the nature of the business of the telephone, telegraph and electric light companies and companies such as street railways, gas companies and water companies are without the necessity of further argument so great as to show conclusively the reasonableness of the classification.

The Decision of the Supreme Court of Delaware Declaring the Tax to be a Tax for the License or Privilege of Using the Streets is Binding Upon the Federal Supreme Court.

In Brown-Forman Company v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, the Court said:

> "But the Kentucky court of appeals has construed the act as not a property tax, but as one

> imposing a license or occupation tax upon the business. . . . Such a construction and interpretation of the statute here involved, by the highest court of the state, should be accepted as definitely determining that the tax complained of is not a property tax, but a license tax imposed upon the doing of a particular business plainly subject to the regulating power of the state."

In Mackay Telegraph & Cable Company v. Little Rock, *supra,* which was a case involving a municipal license tax upon poles of a telegraph company, the Court said:

> "The Supreme Court of the State as we read its opinion dealt with the pole fees not as an agreed compensation for the franchise but as a license tax. Consequently we will—indeed must, for present purposes—so regard it."

We have no fault to find with the authorities cited by the plaintiff-in-error for the proposition that the Supreme Court is not bound by the characterization of a statute by the highest court of the state so far as that characterization may bear upon its constitutional effect, but we submit in this case the Supreme Court of Delaware did more than merely give the tax in question a characterization as a license tax. The Act of 1907 admittedly imposed a license tax upon telegraph companies for the occupation of the streets of the city. The Act of 1913 operates to repeal all acts or parts of acts inconsistent therewith. If the Supreme Court of Delaware had interpreted the Act of 1913 as imposing a property tax, the Act of 1907 would not have been repealed thereby and both acts would be in full force and effect at the present time as is stated by the Supreme Court of Delaware in its opinion. (Record, p. 20.)

The Supreme Court of Delaware, however, in interpreting the Act of 1913 held that it was in substi-

tution of the Act of 1907, imposed by its terms the same kind of a tax and therefore effected a repeal of the 1907 Act. In other words what the Supreme Court of Delaware did in interpreting the Act of 1913 was to construe its operation and effect in relation to the former act. In so doing we submit the Supreme Court of Delaware closed the question to further review by this court.

It would seem to be well established that where the highest court of a state has construed the operation and effect of a state statute and in so doing has so limited its construction as to obviate the objection that it violates the Federal Constitution, that the Federal Supreme Court in passing upon the constitutionality of the statute will follow the construction placed thereon by the state court instead of giving it an independent and broader construction, it might render it violative of the Federal Constitution.

Smiley v. Kansas, 196 U. S. 447, 49 L. Ed. 546;
Gatewood v. North Carolina, 203 U. S. 531, 51 L. Ed. 305;
Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 55 L. Ed. 369.

Wherefore the defendant-in-error submits that the judgment of the Supreme Court of Delaware should be affirmed.

Respectfully submitted,

CALEB S. LAYTON,
JAMES R. MORFORD,
of Wilmington, Delaware, Counsel for John I. Dolan, Collector of Taxes for the Southern District of the City of Wilmington.

NEW YORK, PHILADELPHIA & NORFOLK TELEGRAPH COMPANY *v.* DOLAN, COLLECTOR OF TAXES FOR THE SOUTHERN DISTRICT OF THE CITY OF WILMINGTON.

ERROR TO THE SUPREME COURT OF THE STATE OF DELAWARE.

No. 275. Argued May 2, 1924.—Decided May 12, 1924.

The charter of Wilmington, Delaware, provides for the assessment for taxation of telegraph lines in the city at not less than $6,600 nor more than $7,300 for each mile of the streets used, the rate of tax being the same as in other cases. *Held*, not a property but a privilege tax, within the power of the State as applied to a local corporation, and not repugnant to the due process or equal protection clauses of the Fourteenth Amendment. P. 97.
121 Atl. 18, affirmed.

ERROR to a judgment of the Supreme Court of Delaware affirming a recovery by a tax collector in an action to collect a tax.

Mr. Overton Harris and *Mr. Horace Greeley Eastburn* for plaintiff in error.

Mr. Caleb S. Layton, with whom *Mr. James R. Morford* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the collector of taxes, the defendant in error, to recover taxes due to the City of Wilmington for the years 1913 to and through 1918. The defendant Telegraph Company, the plaintiff in error, demurred to the declaration on the ground that the statute imposing the taxes deprived it of its property without due process of law and denied to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. The demurrer was overruled and judgment was rendered for the plaintiff by the Superior Court and the judgment was affirmed by the Supreme Court of the State. 121 Atl. 18.

The statute in question is an Act of April 7, 1913, amending § 80 of the charter of the City of Wilmington. Laws 1913, c. 205. It authorizes an assessment of telegraph lines in the city at not less than six thousand six hundred dollars and not more than seven thousand three hundred dollars for each mile of the streets used. The rate of taxation on these sums is the same as that for other taxes and neither that nor the modes of determining the amount between the limits fixed is complained of. But it is argued that this is a property tax upon the company's poles and lines, and that it fixes an arbitrary valuation upon them without giving the Company a chance to be heard at any time before the tax is levied. It is argued further that the Company is denied the equal protection of the laws when it and a few others are sin-

gled out and other Delaware property is valued on the actual facts.

The State Court met this argument by holding that the tax was a license or privilege tax and therefore not open to the objections urged. The Company answers that this is characterization of the statute, not construction, and that upon the issue of constitutionality this Court must determine the nature of the tax for itself and is not bound by the name given to it below. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 348. The proposition is true, but when the State Court after a candid discussion that manifests no disposition to escape constitutional limits, has come to the conclusion reached here, we should be slow to differ from it upon a matter having so many purely local elements, even if we did not think it right, as we do. *Clyde* v. *Gilchrist,* 262 U. S. 94, 97.

The Company is a Delaware Corporation and there is no doubt that the State may impose the present tax if it has not used a wrong form of words in doing it. It might impose it as a condition of the grant of the franchise enjoyed by the corporation. It might authorize Wilmington to impose it for the privilege of occupying the streets. The State Court relies mainly on the latter ground. We shall not repeat the arguments of that Court drawn from the history of the legislation concerned and the fact that the last preceding form of this section was admitted to lay a privilege tax. It is enough to refer to its further argument that the valuation expressed in the act is not a valuation of the Company's property, which the Company says is worth only about $500 a mile, but a valuation of the privilege granted. The statute does not tax by the poles, the Company's property, but by the mile, the measure of occupation of the streets. Underground wires are worth more and are taxed less. The supposed discrimination is based upon the same grounds. Telegraph

companies occupy the streets with their poles and may be required to pay for it. Therefore we have no need to decide how far the State might go in discouraging some particular activity, if so minded, by taxes as well as by penalties. *Hammond Packing Co.* v. *Montana*, 233 U. S. 331. Neither shall we consider how far a legislature may go when it deals with specified lands. *Valley Farms Co.* v. *Westchester*, 261 U. S. 155.

Judgment affirmed.